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**RECONSTRUCTING A DIVIDED SOCIETY: DEVELOPMENT OF  
SELF-GOVERNMENT AND JUDICIAL REFORM IN KOSOVO**

**by**

**Oleksandra Baglay**

**Submitted in partial fulfillment of the requirements  
for the degree of Master of Laws**

**at**

**Dalhousie University  
Halifax, Nova Scotia  
October 2001**

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***To My Parents***

***Whose Love and Dedication Made Me Who I Am***

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## **Abstract**

For the past decade the Kosovo has been a subject of conflict. Since June 1999 the Province is undergoing the reconstruction of civil society under the direction of the United Nations in the form of the United Nations Interim Administration in Kosovo (UNMIK). This thesis analyzes the prospects of developing democratic government in a post-conflict Kosovo. On a larger scale, the Kosovo study serves the basis for the analysis of the techniques available for the international community to build democracy in ethnically divided societies.

The argument of this thesis rests on the premise that in ethnically divided societies traditional democratic means are not always able to provide equally meaningful participation of minority and majority ethnic groups in government. The lack of inclusiveness will contribute to the perpetuation of constant political struggle and general instability in a post-conflict zone. Based on the Kosovo study, this thesis argues for the need for a conceptual framework for peace-building in ethnically divided societies. The framework must channel all international activities in a coherent and comprehensive manner towards the goal of democracy-building and stabilization. The thesis suggests that such a framework is found in a combination of the UN concept of peace-building and a model of consociational democracy – a system of governance that provides for mechanisms of inclusion of minorities in government. According to the model of consociational democracy, the governmental structures function according to the principles of proportional representation, grand coalition among the leaders of the major segments of a society and a right of each segments to veto decisions, which are contrary to its interests.

Given the limited experience of the UNMIK to date, there is insufficient data to reach definite conclusions about the success or failure of the international approach to post-conflict reconstruction. Instead, this thesis evaluates how the approximation to a consociational model increases the chances for the development of stable democratic government in Kosovo.

## **List of Abbreviations**

<b>AAK</b>	<b>Alliance for the Future of Kosova</b>
<b>AJC</b>	<b>Advisory Judicial Commission</b>
<b>BSDAK</b>	<b>Bosniacs Party of Democratic Action of Kosova</b>
<b>CEC</b>	<b>Central Election Commission</b>
<b>DRSM</b>	<b>Democratic Reform Party of Muslims</b>
<b>ECAC</b>	<b>Election Complaints and Appeals Sub-Commission</b>
<b>EJS</b>	<b>Emergency Judicial System</b>
<b>EU</b>	<b>European Union</b>
<b>GIG</b>	<b>Citizens' Initiative of Gora</b>
<b>IAC</b>	<b>Interim Advisory Council</b>
<b>ICP</b>	<b>International Civilian Police</b>
<b>IOM</b>	<b>International Organization for Migration</b>
<b>IQPM</b>	<b>Citizens' Initiative of the Independents of Mitrovica</b>
<b>JAC</b>	<b>Joint Advisory Council on Provisional Judicial Appointments</b>
<b>JIAS</b>	<b>Joint Interim Administrative Structure</b>
<b>KFOR</b>	<b>Kosovo Force</b>
<b>KLA</b>	<b>Kosovo Liberation Army</b>
<b>KP</b>	<b>Coalition for Independence</b>
<b>KPC</b>	<b>Kosovo Protection Corps</b>
<b>KPS</b>	<b>Kosovo Police Service</b>
<b>KTC</b>	<b>Kosovo Transitional Council</b>
<b>KTHP</b>	<b>Turkish People's Party of Kosova</b>
<b>LDK</b>	<b>Democratic League of Kosovo</b>
<b>LNDSH</b>	<b>Albanian National Democratic Movement</b>
<b>PQLK</b>	<b>Liberal Centre Party of Kosovo</b>
<b>PLK</b>	<b>Liberal Party of Kosova</b>
<b>MEC</b>	<b>Municipal Election Commission</b>
<b>MITT</b>	<b>Mitrovica Turk Community</b>
<b>NATO</b>	<b>North Atlantic Treaty Organization</b>

<b>OMIK</b>	<b>OSCE Mission in Kosovo</b>
<b>OSCE</b>	<b>Organization for Security and Cooperation in Europe</b>
<b>PDASHK</b>	<b>Ashkali Albanian Democratic Party of Kosova</b>
<b>PDK</b>	<b>Democratic Party of Kosovo</b>
<b>PGK</b>	<b>Provisional Government of Kosova</b>
<b>PRSH</b>	<b>Albanian Republican Party</b>
<b>PBKD</b>	<b>National Democratic Front of Kosova</b>
<b>PGJK</b>	<b>Green Party of Kosova</b>
<b>PLDK</b>	<b>Liberal Democratic Party of Kosova</b>
<b>PSDK</b>	<b>Social Democratic Party of Kosova</b>
<b>PSHDK</b>	<b>Albanian Christian Democratic Party of Kosova</b>
<b>PRK</b>	<b>Republican Party of Kosova</b>
<b>PNDSh</b>	<b>Albanian National Democratic Party</b>
<b>RJS</b>	<b>Regular Judicial System</b>
<b>SDA</b>	<b>Party of Democratic Action of Kosova</b>
<b>SRSG</b>	<b>Special Representative of the Secretary General</b>
<b>UNMIK</b>	<b>United Nations Interim Administration in Kosovo</b>
<b>UNHCR</b>	<b>United Nations High Commissioner for Refugees</b>
<b>USD</b>	<b>Social Democratic Union</b>

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## **Introduction**

One of the most striking contradictions of the contemporary world politics is the great advance in the international mechanisms for the promotion and establishment of peace and almost equally remarkable “development” of the tools and techniques of war and repression. Due to the close interrelation of national, political and economic processes in today’s world, internal conflicts perhaps have stronger impact on the neighbouring states and on the global atmosphere than they did before. Intervention for the establishment of peace may be viewed among the most important tools capable of mitigating the negative consequences of internal conflicts. As a result, the utilization of peace operations has increased dramatically during the last decade. The development of various forms of peace operations, on one hand, has opened new opportunities for conflict resolution, but, on the other, has brought new questions about the legal framework for such operations and their relative effectiveness and cost.

One of these new and relatively unexplored peace tools is peace-building. The idea of peace-building was first introduced in the range of the UN instruments for peace in 1992 by *An Agenda for Peace*.<sup>1</sup> However, only in June 1999 (the time of the establishment of the United Nations International Administration in Kosovo (UNMIK)) could we evidence the comprehensive practical implementation of this idea.

It would be wrong to say that the UNMIK is the first, pilot peace-building activity. Similar tasks were carried out by the peacekeeping missions in Somalia and Cambodia. However, the Kosovo mission represents a qualitatively new effort. Unlike the majority of previous missions, it seeks not merely to treat the symptoms of a conflict, but to address its sources. This objective requires greater international involvement not only in the termination of a conflict and initial restoration of peace in Kosovo, but also in a long-term reconstruction of state institutions and the development of civil society. This

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<sup>1</sup> *An Agenda for Peace – Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. GAOR/SCOR, 47<sup>th</sup> Sess., Preliminary List Item 10 at 55, U.N. Docs. A/47/277 & S/24111 (1992) [hereinafter *An Agenda for Peace*].

is probably the first instance of a mission with such a wide scope of activities - wholesale reconstruction of the state<sup>2</sup> and society.

This thesis covers only a narrow segment of the multidimensional international efforts in the Province – the development of self-government and the reconstruction of the judiciary. In this respect, I discuss the following issues: what measures are available for the reconstruction of a stable democratic government in a deeply divided post-conflict society; what measures are feasible for the Kosovo situation; and what are the potential long-term effects of their application in Kosovo.

My framework for analysis of the Kosovo reconstruction is the synergy of two concepts - peace-building and consociationalism. Each of the concepts highlights a different aspect of the international activities in Kosovo. The peace-building concept provides the framework for the assessment of the institutional arrangement of the UNMIK. Consociationalism evaluates how the means adopted by the UNMIK contribute to the development of stable democratic government in an ethnically divided Kosovo. Consociationalism suggests that stability and democratic governance in an ethnically divided society can be achieved only through the employment of special techniques which guarantee minority inclusiveness and cooperative decision-making on matters of concern to the whole society.

The thesis seeks to capture both theoretical controversies located within the discourse of peace-building and practical problems of the Kosovo mission. Chapter I reviews the concept of peace-building and consociational democracy. It explores the potential benefits of their cooperative utilization and establishes the criteria for the evaluation of the UNMIK activities. Chapter II presents a theoretical debate over the legal and moral issues of peace-building. This chapter further develops the criteria for legitimate peace-building. Chapters III and IV deal with the practical aspects of the development of self-government and re-establishment of the judiciary in Kosovo. Each activity of the international mission is viewed in two dimensions: first, whether it complies with the requirements and limits established for peace-building; second, how these activities contribute to the conciliatory democratic result generally sought in peace-building.

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<sup>2</sup> I refer to the activities in Kosovo as state building meaning solely the nature of the international activities, but not implying that the international community attempts to build an independent state of Kosovo.

I do not contend that an international administration was expressly guided by the principles of consociationalism. Neither do I suggest that consociationalism can be applied in Kosovo without any reservations. The success of consociationalism in each individual case depends on the individual circumstances and means used for the implementation of its principles.

Two years of an international administration is not a long term enough to allow finite conclusions on the success or failure of the UNMIK. The currently available information gives one an opportunity to judge on the achievement of short-term goals, such as humanitarian relief and the re-establishment of state institutional structures. In this respect, the UNMIK can only be judged on its ability to live up to certain expectations of the international community in bringing stability to the Province. However, there is still little basis for the evaluation of the long-term effect of the consociational-type techniques adopted in Kosovo. At the same time, considering consociationalism critically, I will analyze whether it can offer effective solution for situations like Kosovo and if not, what needs to be changed in this theoretical concept to improve it.



## **Chapter I**

### **A Theoretical Framework for Effective Peace-building**

Any theoretical model or concept is usually construed as a set of general trends observed in a particular situation and a range of remedies that can be applied for the resolution of tensions in that particular situation. The general character of concepts and models is both an advantage and a limitation. On the one hand, the general character of a model allows the remedies to be applied to a wider range of situations. On the other hand, the success of the implementation of a model may often be limited because general guidelines fail to adequately address the deviations from the usual circumstances. The peace-building concept suffers from such limitations. Although it was developed specifically for the establishment of peace, it does not embrace the peculiarities of reconstruction in ethnically divided societies. Because of that, I will tailor my theoretical approach to the analysis of the events in Kosovo as a combination of two concepts which together can provide crucial and sensitive guidelines for the practical reconstruction of the ethnically divided Province. They are peace-building and consociational democracy. Both concepts seek the same objective – ensuring stability and democratic governance in a society. However, they seek this objective from different perspectives. Peace-building focuses more on what should be done, while consociationalism tells how it is to be done in an ethnically divided society and what effect particular means are likely to have. Because the two concentrate on different aspects of governance, their combined utilization in peace operations can provide a well-rounded approach to post-conflict reconstruction. Each concept will be discussed in this Chapter. The application of each element of the two concepts in Kosovo will be analyzed in Chapters III and IV.

#### **A. Peace-building**

##### *1. Definitions and characteristics*

There is no clear agreement among scholars or practitioners as to the concept of peace-building. In the most general understanding, peace-building refers to the “creation

of a specific infrastructure within and among nations, which removes causes of war and offers alternatives to war in situations where it might occur.”<sup>3</sup>

The modern UN concept of peace-building stems from three major documents: *An Agenda for Peace*,<sup>4</sup> the *Supplement to An Agenda for Peace*,<sup>5</sup> and the *Brahimi Report*.<sup>6</sup>

The 1992 *Agenda for Peace* introduced the initial, basic ideas about peace-building. It identified the main direction of peace-building –to prevent reoccurrence of conflict - and exemplified possible peace-building activities. *An Agenda for Peace* defined peace-building as “an action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict.”<sup>7</sup> Peace-building is viewed in two dimensions: as “concrete cooperative projects which link two or more countries in a mutually beneficial undertaking”<sup>8</sup> and as UN assistance in the transformation of deficient national structures and strengthening of democratic rule.<sup>9</sup> Moreover, the document stipulated the UN obligation to “develop and provide when requested”<sup>10</sup> support for development of new democratic institutions in post-conflict states.

A *Supplement to An Agenda for Peace* has further developed the guidelines for the “structures for the institutionalization of peace.”<sup>11</sup> Given that after an intra-state conflict state institutions have often collapsed, the Secretary-General emphasized that the international peace-building intervention must extend beyond military and humanitarian

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<sup>3</sup> Dyan Mazurana & Susan McKay, *Women and Peace-Building* (Montreal, PQ: International Centre Human Rights & Democratic Development, 1999) at 7.

<sup>4</sup> *An Agenda for Peace*, *supra* note 1.

<sup>5</sup> *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. GAOR/SCOR, 50<sup>th</sup> Sess., U.N. Docs. A/50/60 & S/195/1 (1995) [hereinafter *Supplement to An Agenda for Peace*].

<sup>6</sup> Panel on the United Nations Peace Operations, *Report of the Panel on the United Nations Peace Operations*, UN GAOR, 55<sup>th</sup> Sess., UN Doc. A/55/305-S/2000/809 (2000) at 2, online: United Nations Homepage, [http://www.un.org/peace/reports/peace\\_operations/](http://www.un.org/peace/reports/peace_operations/) > (date accessed: 24 September 2000) [hereinafter *Brahimi Report*].

<sup>7</sup> *An Agenda for Peace*, *supra* note 1.

<sup>8</sup> *An Agenda for Peace*, *supra* note 1, para. 56.

<sup>9</sup> *Ibid.*, para. 59.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 49.

tasks and include reconstruction and reconciliation activities.<sup>12</sup> The Supplement distinguished two situations when peace-building can take place. First, peace-building in the zone where no peacekeeping operation has been deployed before. Then, the Secretary-General should act on the basis of his general mandate for preventive diplomacy, peacekeeping and peace-building and take an initiative of sending a mission (given that a host state gives its consent) to the country in question.<sup>13</sup>

The second case for peace-building is when a comprehensive political settlement has been negotiated and verification of its implementation is entrusted with a multifunctional peace-keeping force.<sup>14</sup> In such a situation the UN already has a presence in the state, and its role has already been accepted by the parties; the peace-keeping operation is already mandated with peace-building activities.<sup>15</sup> Here, peace-keeping is seen as a prerequisite for peace-building. It is proposed that when a multifunctional peace-keeping operation succeeds in restoring normal conditions, the UN programmes, funds, offices and agencies take over the responsibility for further economic, social and humanitarian reconstruction.<sup>16</sup> The Supplement suggested that the decision-making responsibility in a peace-building operation should be transferred from the Security Council to the General Assembly or other inter-governmental bodies.<sup>17</sup> At the same time, the peace-building strategy should be worked out in joint consultations between the UN and the parties to the conflict.<sup>18</sup>

The recent Brahimi Report represents one of the first attempts to summarize the UN experience in peace maintenance and to derive practical recommendations from this practice. It reaffirms many of the previously stated features of peace-building. The Report defined peace-building as “activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war.”<sup>19</sup> It recognized the importance of

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<sup>12</sup> *Supplement to An Agenda for Peace*, *supra* note 5, para. 13.

<sup>13</sup> *Ibid.*, para. 56.

<sup>14</sup> *Ibid.*, para. 49.

<sup>15</sup> *Ibid.*, para. 50.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, para. 54.

<sup>18</sup> *Ibid.*, para. 48.

<sup>19</sup> *Brahimi Report*, *supra* note 6, para. 13.

the multidimensional engagement of local parties in peace-building.<sup>20</sup> In particular, it is necessary that the population consciously accepts elections and the formation of local government as “an appropriate and credible mechanism through which their views on government are represented.”<sup>21</sup> This means that peace-builders should be concerned not only with the implementation of solutions that they deem appropriate, but also with the population’s acceptance and understanding of such solutions.

The Report recognized the great transformative character of peace-building: “United Nations thus do not deploy into post-conflict situations so much as they deploy to create such situations.”<sup>22</sup> Through the work in personal, political and other areas, peace-builders drive an unfinished conflict from the military to the political arena and this way make the diversion of a conflict permanent.<sup>23</sup>

The Report also takes the connection between peacekeeping and peace-building seriously: “History has taught that peacekeepers and peacebuilders are inseparable partners in complex operations: while the peacebuilders may not be able to function without peacekeepers’ support, the peacekeepers have no exit without the peacebuilders’ work.”<sup>24</sup>

According to the mentioned UN documents, peace-building encompasses a variety of activities in different areas of public life: disarmament, restoration of order, destruction of weapons, repatriation of refugees, training of security personnel, electoral monitoring, strengthening the rule of law, reforming governmental institutions, promoting reconciliation, etc.<sup>25</sup> These measures have different degrees of priority, depending on the stage of post-conflict rehabilitation. At the time of deployment, peace-building activities are targeted at rapid humanitarian relief, reconstruction of humanitarian objects, disarmament and restoration of order. At a further stage, international organizations will usually proceed towards institution-building – the establishment of the judiciary (through the appointment of judges and prosecutors, their legal training, technical support of the courts, etc.), the formation of representative bodies

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<sup>20</sup> *Brahimi Report*, *supra* note 6, para 37.

<sup>21</sup> *Ibid.*, para. 38.

<sup>22</sup> *Brahimi Report*, *supra* note 6, para. 20.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, para. 28.

<sup>25</sup> *Ibid.* See also *An Agenda for Peace*, *supra* note 1, para. 55.

(through the promotion of political participation, preparation and monitoring of elections), and the creation and training of the local police.

As evidenced in the UN documents, peace-building is exercised by an outside authority (usually in the form of an international administration) which seeks to fulfill two objectives – to transform a post-conflict society and to provide for its sustainability. Transformation is aimed at changing the conflict at the political, structural and social levels, which precludes reoccurrence of tension.<sup>26</sup> Sustainability means: 1) local governmental structures are put in operation and are able to independently manage the affairs in a post-conflict zone after the withdrawal of an international mission; and 2) those local structures continue to function in accordance with democratic principles introduced by peace-builders.

The achievement of the two main goals of peace-building requires adoption of a certain strategy. Boutros-Ghali noted in *An Agenda for Peace* that “there is an obvious connection between democratic practices – such as the rule of law and transparency in decision-making – and the achievement of true peace and security in any new and stable political order.”<sup>27</sup> Consequently, democratization becomes one of the central strategies for achieving transformation and sustainability. First, democratic institution-building catalyses the transformation of society and its political system. In turn, the existence and the work of the newly established institutions lays the foundations for the self-sustainability of a post-conflict society.<sup>28</sup>

The transformation sought by peace-builders implies the alteration of the nature of a post-conflict society. Such a task involves a number of challenges from both a practical and a scholarly point of view. From a scholarly perspective, the difficulties with exercising transformative peace-building are twofold: first, no comprehensive peace-building theory has been elaborated yet<sup>29</sup> – for example, there are no clear principles

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<sup>26</sup> John Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington: US Institute of Peace Press, 1997) at 75.

<sup>27</sup> *An Agenda for Peace*, *supra* note 1.

<sup>28</sup> The causal relation between democracy and resolution of the problems of a post-conflict society can also be viewed from another perspective: the establishment of democratic government may be a result, rather than the cause of the transformation. See, Samuel Barnes, “The Contribution of Democracy to Rebuilding Postconflict Societies” (2001) 95 AJIL 86 at 86-87.

<sup>29</sup> Here, I mean lack of developments other than guidelines stipulated in *An Agenda for Peace, Supplement to an Agenda for Peace and the Brahimi Report*.

governing the status of peace-builders in a post-conflict zone (e.g., to what extent they should be impartial, when could they use weapons, etc.); second, how legitimate are lengthy large-scale international interventions in post-conflict reconstruction.<sup>30</sup> These theoretical problems have a strong impact on the practical exercise of peace-building. As I will show in the next Chapter, the legitimacy of a peace-building mission, and the organs re-established by it, influences the amount of support that an international administration will receive from the local population.

As pointed out above, to date the peace-building concept remains vague. Neither the UN documents nor scholarly discussion provide sufficient precision about the characteristics which allow one to distinguish peace-building from other peace operations and to define the limits on the conduct of peace-builders. For the purposes of this thesis, one can identify the following characteristics of peace-building (as derived from the previously discussed Agenda for Peace, the Supplement to An Agenda for Peace and the Brahimi Report):<sup>31</sup> 1) comprehensive nature – it embraces political, economic, military, humanitarian and other tasks; 2) it includes institution-building as one of its essential activities; 3) it seeks to transform a society in a way that precludes the reoccurrence of tension and provides the sustainability of such transformation; 4) it is exercised in close connection with peacekeeping (the latter is seen as a prerequisite for peace-building in terms of both the legal basis and the foundation for practical activities of a peace-building mission); 5) it requires close cooperation between peace-builders and local parties; and 6) it takes place after the cessation of hostilities.

These characteristics create a certain idea about peace-building, but leave unresolved several essential issues, including: whether a host state's consent is required for peace-building; whether peace-builders have to be neutral and impartial; how broad their military and police power of a peace-building mission should be. The answers to these questions will be provided through the analysis of the theory and practice of peace-building in Chapter II. From the perspective of the UN documents, we can observe the

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<sup>30</sup> The second problem may be classified as a “moral” problem of peace-building. It will be examined in Chapter II.

<sup>31</sup> Peace-building can be exercised at pre-conflict stage as a counterpart of preventive diplomacy and at post-conflict stage. The discussion of this thesis concerns post-conflict peace-building only.

following trend. First, the host state's consent is likely to be needed. An Agenda for Peace and the Supplement expressed a concern that peace-building may be treated by local parties as an invasion on the sovereignty of their state. Since such a situation is of concern, it would be logical for the international community to seek the host state's consent to the deployment of a mission. Second, because the documents recognize deep involvement of the UN and other agencies in reconstruction and the transformative nature of such reconstruction, I can suggest that peace-builders are viewed as parties to the reconstruction process, but not as neutral and impartial observers of the transformation.

## 2. *Peace-building in a divided society*

At the point when the international community has not acquired enough feedback about peace-building through "in field" missions, the theoretical concept of peace-building<sup>32</sup> is likely to be the main guideline for the planning of international actions. As a concept, peace-building stipulates commonly shared values – peace, democracy, human rights – but does not prescribe particular means for their achievement. What is crucial in relation to Kosovo, is that the peace-building concept to date has inadequately addressed the issue of institution-building under the circumstances of divided societies.

According to political science studies, "...a peculiar set of problems surrounds the maintenance of democracy"<sup>33</sup> in divided societies.<sup>34</sup> The peculiarities of political organization and electoral behaviour in these societies create a situation that even under the existence of democratic institutions and procedures the domination by a majority is

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<sup>32</sup> Here, I mean the concept derived from *An Agenda for Peace*, the Supplement to an Agenda for Peace and the Brahimi Report.

<sup>33</sup> Donald L. Horowitz, "Constitutional Design: An Oxymoron?" in *Designing Democratic Institutions*, Ian Shapiro & Stephen Macedo (eds.) (New York: New York University Press, 2000) 253 at 253.

<sup>34</sup> Societies may be divided by different criteria – ethnic, cultural, linguistic, religious, social, etc. The following discussion places a lot of emphasis on the distinct nature of divided societies, especially ethnically divided societies, like Kosovo (the evidence for that will be provided in Chapter III). It should be borne in mind that the effect of democratic practices is contingent not merely on the fact of ethnic division, but rather on the nature of such division, historical peculiarities of the zone, political culture, etc.

possible, along with the exclusion of minorities from government.<sup>35</sup> Let us briefly review why democratic practices produce such an effect in a divided society.<sup>36</sup>

The two inalienable characteristics of democracy are contestation and inclusiveness: contestation of political power within a framework of rights and institutions and inclusiveness regarding the adult population's right to participate in such contestation.<sup>37</sup>

In an ethnically divided society, ethnic identity would often define if a person or a group is included or excluded in the contestation of power. Moreover, the very contestation of power is exercised along ethnic lines. The sense of ethnic group creates a strong impetus towards party organization along ethnic lines.<sup>38</sup> After a deadly ethnic conflict, ethnic affiliation becomes even stronger source of the sense of "trust...and protection against neglect of one's interests by strangers."<sup>39</sup> Thus, not only parties are formed along ethnic lines, but also people usually vote for parties, which represent their ethnic group. Then, democratic elections regress into a zero-sum game: one ethnic group wins by its democratic weight and others see themselves as losing all and being excluded not only from the government, but also from the larger political community.<sup>40</sup> Being underrepresented in the organs of government, minority groups have limited access to power and little opportunity to ensure that their interests are taken into account. The majority rule in a divided society may produce decisions that serve the benefit of the

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<sup>35</sup> Donald Horowitz, "Democracy in Divided Societies" in *Nationalism, Ethnic Conflict, and Democracy*, Larry Diamond & Marc Platter (eds.) (Baltimore: The John Hopkins University Press, 1994) 35 at 37.

<sup>36</sup> The following discussion involves a great deal of generalization about patterns of democracy in divided societies. I highlight only the most important and common trends that can be expected in such a society. At the same time, it should be borne in mind that the peculiarities of ethno-political balance and the effect of consociational techniques may significantly differ from case to case.

<sup>37</sup> Barnes, *supra* note 28 at 88.

<sup>38</sup> *Ibid.*

<sup>39</sup> Horowitz, *supra* note 35 at 49.

<sup>40</sup> Donald Horowitz, "Ethnic Conflict Management for Policy Makers" in Joseph V. Montville (ed.) *Conflict and Peacemaking in Multiethnic Societies* (Lexington, Mass.: Lexington Books, 1990), 115-16.



majority, but ignore the needs of minorities. This way majority rule becomes not only ineffective in mitigating ethnic tensions, but also incompatible with democracy.<sup>41</sup>

The peace-building concept refers to democracy-building in general terms and, thus, it most likely suggests only traditional democratic means for democratization in an ethnically divided society. Yet, in an ethnically divided society the usual democratic rules do nothing about ethnic exclusion and even more, they foster it.<sup>42</sup> The unresolved tension between minority and majority will be like a powder keg ready to explode any time. Then, the peace-building concept, which relies on traditional means and does not include special mechanisms against exclusion of minorities from the government, will fail to achieve its main goal - transformation of society in a way that prevents the reoccurrence of a conflict and sustainability of that transformation. Consequently, to accomplish its objective, peace-building has to address ethnic division through the mechanisms that reconcile ethnic divergences within the democratic process. In my opinion, such mechanisms can be found in political science theory. In particular, the model of consociational democracy suggests some avenues for more effective peace-building.

## **B. Consociational Democracy**

### *1. General characteristic*

The model of consociational democracy was initially developed by Arend Lijphart in his work "Democracy in Plural Societies." This model suggests that in plural societies<sup>43</sup> the establishment and maintenance of stable democratic government becomes possible due to special built-in techniques, which ensure participation of all major segments of the society in state decision-making. These special techniques (or elements of consociational democracy) are: 1) grand coalition; 2) mutual veto; 3) proportionality in political representation, civil service appointments and allocation of public funds; and 4) a high degree of autonomy for each segment of the society.<sup>44</sup>

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<sup>41</sup> Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (London: Yale University Press, 1977) at 113.

<sup>42</sup> Horowitz, *supra*, note 35 at 45.

<sup>43</sup> Plural society is a society divided into segments based on linguistic, cultural religious, racial, ethnic or other characteristics. See, Lijphart, *supra* note 41 at 3-4. Note that the term "plural society" is broader than "ethnically divided society."

<sup>44</sup> *Ibid.*, at 25.

The grand coalition presupposes the participation of the leaders of all significant segments in governing a society.<sup>45</sup> Grand coalition is a central element of consociationalism. It is the factor that guarantees conciliation in a society. The participation of the major segments of the society may be achieved, *inter alia*, through the establishment of reserved seats in the legislature, special requirements to the composition of the organs of government, etc. Importantly, it is not the mere fact of participation that produces the conciliatory result of a grand coalition. It is the willingness and ability of the leaders of the segments to cooperate and compromise. If the leaders of segments are formally included in government, but refuse to cooperate with each other, no mutually acceptable solution can be elaborated and the decision-making is most likely to be ruled by the segment that has majority in government.

Grand coalition is complemented by three other instruments: mutual veto, proportionality and segmental autonomy. These three elements may be regarded as procedural rules, which support collective decision-making and adoption of mutually acceptable decisions.

Grand coalition allows minority participation in decision-making, but if in such a coalition decisions are made by majority vote, there is no guarantee that minority interests will not be outvoted by the majority. This is why an effective grand coalition requires such a tool of political protection as mutual veto.<sup>46</sup> Each segment of a society has power to veto a decision if it considers it to be contrary to that segment's interests. Mutual veto may be incorporated in legal rules as a requirement of making decisions by consensus.

Proportionality is the third element, which represents a deviation from majority rule. Proportionality is utilized in at least two forms. First, as a guideline for allocating seats in state organs and financial resources among different segments<sup>47</sup> and in the design of an electoral system. Second, as a principle of decision-making that allows groups to influence decisions in proportion to their numeric weight.<sup>48</sup>

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<sup>45</sup>Lijphart, *supra* note 41, at 32.

<sup>46</sup>*Ibid.*, at 37.

<sup>47</sup>*Ibid.*, at 38.

<sup>48</sup>*Ibid.*, at 39.

Segmental autonomy is a corollary of the grand coalition principle. The decisions on matters of common concern are made by all segments of the society together. The matters of exclusive concern for a particular segment are resolved by that segment alone.<sup>49</sup> Segmental autonomy enables minorities to rule over the areas of their exclusive concern.<sup>50</sup> It includes delegation of rule-making and rule-application powers to the segments of a plural society. One of the forms of segmental autonomy is federalism.<sup>51</sup>

These are briefly the main characteristics of the elements of consociationalism. Because I propose consociationalism as a remedy for Kosovo, we need to be aware not only of the benefits, but also of the limitations of this model.

The criticisms of consociationalism can be summarized in four points. First, it is noted that grand coalition provides for relatively small and weak opposition.<sup>52</sup> Inclusion of all segments in decision-making undermines the incentives for democratic competition, which is an essential prerequisite for healthy democracy. If everybody is included and minorities have their fixed seats in representative bodies, what is the sense of trying to win voters' support?<sup>53</sup> Minority parties that automatically get seats in the legislature may feel reluctant to actively participate in the contest for power during elections. At the same time, majority parties are likely to oppose automatic inclusion of minority members in the legislature on the grounds that such inclusion unduly favours minority parties. Thus, grand coalition may not only weaken the opposition, but also strengthen the aggressiveness of majority parties. It may also produce an opposition, which is based not on difference in political positions, but rather on ethnic affiliation.

Second, as a corollary of grand coalition, proportional system creates little incentives to generate pooling of votes across ethnic lines either at electoral or at post-electoral stage. Because the consociational system relies on quotas and restraints rather than positive incentives, the interethnic dialogue will have a competitive rather than cooperative character.<sup>54</sup> Paradoxically, proportionality may be viewed as preventing

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<sup>49</sup> Lijphart, *supra* note 41, at 41.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, at 42.

<sup>52</sup> *Ibid.*, at 47.

<sup>53</sup> Horowitz, *supra* note 35 at 49.

<sup>54</sup> *Government Policies and Ethnic Relations in Asia and the Pacific*, Michael E. Brown & Sumit Ganguly (eds.) (Cambridge: The MIT Press, 1997) at 553.

conciliatory results, which is sought through introducing consociational techniques. Another objection to proportionality may be raised from the position of meritocracy. Appointments based on person's ethnic identity rather than individual qualities, emphasize ethnic affiliation as a passport for obtaining certain public positions. Then, ethnic boundaries are likely to be maintained rather than smoothed over.

Third, the consociational model, concerned with equal treatment of groups rather than individual equality,<sup>55</sup> creates "communal society" as opposed to democracy in a homogenous society, where the emphasis is made on individual rights and freedoms.<sup>56</sup> The emphasis on ethnic community threatens to undermine the goals of maximizing individual freedom and equality in society.<sup>57</sup>

Fourth, the remedies of the consociational model are mainly targeted at the representative or executive branch of government. The other systems of state organs, like the judiciary and the police, are usually overlooked as if they were not influenced by ethnic division. This omission is erroneous. Not only the judiciary and the police reflect ethnic division, but they may also contribute to mitigation or, to the contrary, strengthening of ethnic exclusion.<sup>58</sup> Consequently, consociationalism needs to develop mechanisms of minority inclusion, which will be suitable for application to the judiciary and the police.

The presented critiques are strong enough to question the workability and usefulness of adapting consociationalism in plural societies. Do these limitations imply that consociationalism is inherently flawed? I do not support either an extreme position that consociationalism is an inherently flawed model or an opposite view on it as a panacea for divided societies. The degree of the deficiency of consociationalism depends on two factors: the individual set of circumstances in the country in question and the means chosen for the implementation of the elements of consociationalism. The limitations of consociationalism reveal themselves in different forms and to different degrees, depending on the characteristics of a particular society. For example, in such

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<sup>55</sup> Horowitz, *supra* note 35 at 49.

<sup>56</sup> *Ibid.*, at 48.

<sup>57</sup> David Wippman, "Introduction" in *International Law and Ethnic Conflict* David Wippman (ed.) (Ithaca: Cornell University Press, 1998) at 240.

<sup>58</sup> This issue will be discussed in detail in Chapter III.

plural societies as Belgium and Switzerland consociationalism does not prevent either pooling of votes across ethnic lines or the existence of effective opposition.<sup>59</sup> There the power sharing among ethnic groups is traditionally exercised through inter-ethnic coalitions: poly-ethnic parties (Switzerland) or through poly-ethnic unions of mono-ethnic parties (Belgium).<sup>60</sup> It should be noted that consociationalism was developed on the basis of studies of stable democracies in Austria, Belgium, the Netherlands, and Switzerland. Consequently, the proposed remedies largely rely on the processes inherent to stable democracies. Because the circumstances of a post-conflict society are different, the peculiarities of the country in question may place a restraint on the success of consociational techniques. Thus, depending on the characteristics of a society, consociationalism may or may not suffer from the mentioned limitations.

Another factor that influences the effectiveness of consociationalism in mitigating ethnic tension is the means chosen to implement the elements of consociationalism. For example, consociationalism is criticized for creating little incentive for politicians to moderate their statements and for voters to vote across ethnic lines. The incentives for such pooling of votes and moderation of positions depend, *inter alia*, on the design of an electoral system. One of the successful examples of creating such incentives through electoral system is found in Nigeria. There the electoral system was designed in a way to guarantee that a candidate for President of the Republic would be moderate on matters of interethnic relations.<sup>61</sup> To win a candidate had to receive the largest number of votes plus at least 25% of the votes in at least two-thirds of the 19 states.<sup>62</sup> This formula precluded two of the three main ethnic groups from combining to win elections without minority support.<sup>63</sup> The first elections provided for the sought result – the first president, Shehu Shagari proved to be a “panethnic figure.”<sup>64</sup> This example confirms that consociationalism developed on the basis of stable democracies can still be effective in

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<sup>59</sup> Philippe Van Parijs “Power-sharing versus Border-crossing in Ethnically Divided Societies” in *Designing Democratic Institutions*, Ian Shapiro & Stephen Macedo (eds.) (New York: New York University Press, 2000) 296 at 307.

<sup>60</sup> *Ibid.* Actually, the model of consociationalism elaborated by Lijphart was to great extent inspired by the democratic practice of these two countries.

<sup>61</sup> Horowitz, *supra* note 33 at 263.

<sup>62</sup> *Ibid.* The territories of states were a proxy for ethnicity.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

developing states if implemented with careful consideration of local peculiarities. As we can see, it is not consociationalism as such that works or does not work, but the mechanisms for its implementation that are inadequate or not. In Chapter III we will see what system was adopted for the implementation of the elements of consociationalism in Kosovo.

## *2. Implication of consociationalism for Kosovo*

The particular set of circumstances in Kosovo will to a great extent define what elements of consociationalism can be adopted and what adverse effect on reconciliation the limitations of consociationalism may have. The characteristics of the situation in Kosovo may be divided into two categories: those that are likely to increase the adverse effect of consociationalism and those that are likely to mitigate it. The nature and degree of ethnic division, the previous existence of an open conflict between ethnic groups, poor economic conditions, uncertainty about the future status of the Province, differences in political positions of the majority and minority parties – these factors are likely to increase the adverse effect of consociationalism. These factors themselves are limitations on the implementation of consociationalism and its success in Kosovo. At the same time, there is a factor that is likely to mitigate the limitations of consociationalism. It is the existence of an international administration in Kosovo, which has power to set up the rules of behaviour of the main participants of the political process and to control the enforcement of these rules. Usually the division of society prevents it from taking an action to overcome such division.<sup>65</sup> However, in case of Kosovo, there is an outside power (an international administration) that exercises pressure for the implementation of a coherent package of techniques, which facilitate minority inclusion.

It has been determined in the preceding discussion that the success of consociationalism depends on the circumstances of a particular country and measures adopted for the implementation of consociationalism. Then, in relation to Kosovo it is necessary to look at: 1) what elements of consociationalism are suitable for Kosovo? 2) can these elements be actually implemented? If yes, through what techniques? 3) what is the likely effect of their implementation? These questions will be briefly addressed

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<sup>65</sup>Horowitz, *supra* note 33 at 261.

below, but their more detailed analysis is to follow in Chapters III and IV where the concrete techniques used by the UNMIK will be discussed.

*Grand coalition.* For a post-conflict society, the importance of a grand coalition lies in its potential to promote post-conflict reconciliation, cooperation and fairness of decision-making. Given the peculiarities of Kosovo (that Kosovo is a part of a state; that it is currently administered by an international administration; etc.), the formation of a grand coalition will differ from the process described by Lijphart. He applied the model for independent states, but Kosovo is an internationally administered province. The essence of the principle remains the same – to ensure that matters of common concern are decided with consideration of the interests of all segments. However, there may be several deviations from the pattern proposed by Lijphart.

In Kosovo grand coalitions are created under the pressure of the international administration, but not through the internal incentives of the political process. Grand coalition at the provincial level was created through the nomination of the representatives of all major segments of the Kosovo society in the UNMIK-created organs.<sup>66</sup> These organs included the leaders of religious, political, ethnic and other segments. The pressure of the international authority was crucial for overcoming the post-conflict reluctance of political leaders to enter multiethnic bodies and conduct dialogue with each other.

The mere fact of the inclusion of ethnic community leaders is a precondition, but not yet a guarantee for the emergence of a grand coalition. For example, Kosovar leaders often resorted to boycotting decision-making or refusing to participate in multiethnic organs in order to advocate their political demands.<sup>67</sup> If leaders are formally included, but decline the mutual decision-making, a grand coalition does not accomplish its aim of producing mutually acceptable solutions. It confirms our previous assumption that an international administration can only create strong preconditions for overcoming unwillingness of local parties to enter into inter-ethnic dialogue, but it is for the locals to make the most of such preconditions.

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<sup>66</sup> For more detailed discussion of these organs, their composition and powers see, Chapter III.

<sup>67</sup> One of the vivid examples is the position of Kosovo Serbs. Their representatives were appointed to the UNMIK-created organs, but they refused to take seats. Only after negotiations with the SRSB did they agree to participate in the meetings as observers only.

*Mutual veto.* Mutual veto is an important guarantee that minorities have their interests taken into account during decision-making in grand coalitions. However, there is a danger that the frequent use of veto will lead to paralysis and deadlock in decision-making. Lijphart believed that this danger is not likely to be serious because, first, the fact that the veto is available creates the feeling of security for a respective minority and, thus, makes the use of the veto improbable;<sup>68</sup> second, each segment is aware of the threat of deadlock and will try to reach mutually acceptable solutions.<sup>69</sup> These reasons seem to be convincing, but they are likely to be true for societies with more or less established structures and power sharing where rationality becomes a main guideline for decisions. In contrast, the behaviour in post-conflict societies continues to be significantly influenced by ethnic sentiment. Minority and majority groups are so hostile towards each other that decisions are likely to be dictated by populist motives and emotions rather than rationality. When rationality, as the main safeguard against unrestricted use of veto, is absent, the risk of deadlock becomes very high. There is a danger that in a post-conflict society mutual veto will have destructive, rather than conciliatory effect. Again, a lot will depend on the instruments chosen to design the veto power. In this respect, the approach adopted by the UNMIK is very interesting. Through a number of tools the administration tailored a model of a moderate mutual veto which, on the one hand, allows ethnic communities to protect their interests, but, on the other, reduces the danger of deadlock.<sup>70</sup> Another tool available for preventing deadlock, which results from the use of the veto, is the power of the international administration to interfere in case of an organ's inability to reach a decision. This method, however, should be viewed as acceptable only for the initial stages of reconstruction.

*Proportionality.* Proportionality is another important mechanism, which strengthens the inclusiveness of minorities in government through seat allocation and decision-making procedures. In Chapters III and IV we will examine in more detail how the UNMIK employed proportionality in the appointment of the local bodies and judicial personnel and in tailoring the electoral system.

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<sup>68</sup> Lijphart, *supra* note 41 at 37.

<sup>69</sup> *Ibid.*

<sup>70</sup> This mechanism will be discussed in Chapter III.



*Segmental autonomy.* Segmental autonomy provides major segments of the society with the authority to manage their affairs independently. Lijphart discussed segmental autonomy as a solution for a state. In relation to the province of Kosovo, it may have somewhat different effect. On the one hand, segmental autonomy would mean delegation of certain powers to the Province's minorities in the areas of their (minority) concentration.<sup>71</sup> This ability of minorities to manage own affairs facilitates their fuller inclusion in the government. It would also be consistent with the general trend of decentralization of power through the municipal self-government. On the other hand, in regard to the Serb municipalities segmental autonomy can produce a destabilizing effect. In my opinion, further delegation of power to the Serb communities may lead to their claims for secession. For this reason, the issue of implementing segmental autonomy and its scope should be dealt with special care. It may be expedient to implement only three (grand coalition, mutual veto and proportionality), but not four elements<sup>72</sup> in Kosovo. Then, there is a legitimate question whether these elements can be implemented separately. On the one hand, according to Lijphart's concept, the four elements of consociationalism – grand coalition, mutual veto, proportionality and segmental autonomy – are complementary to each other. Only together can they be effective in mitigating ethnic tension. Horowitz suggests that the four elements of the consociational model are complementary to each other and are intended to work as a coherent project. He warns that the adoption of certain parts of the model without the others may not only fail to reduce a conflict, but also lead to worse results than doing nothing at all.<sup>73</sup> For example, grand coalition without mutual veto will not guarantee that the interests of minorities will not be overridden by the ethnic majority. On the other hand, not all elements are suitable or can be quickly implemented in Kosovo. In his work on democratization in South Africa, Horowitz noted that "the trick [about successful

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<sup>71</sup> All Kosovo municipalities are granted equal degree of self-government, but this is not segmental autonomy. Segmental autonomy means delegation of powers to segments, but not merely territorial units. In Kosovo municipal boundaries do not coincide with the ethnic distribution of the population (except for the three Serb municipalities).

<sup>72</sup> As pointed at the beginning of the section, the fourth element is segmental autonomy.

<sup>73</sup> Horowitz, *supra* note 33 at 261.

democracy-building] is to borrow right institutions,”<sup>74</sup> i.e., those that are appropriate and suitable in given circumstances. I suggest that grand coalition, mutual veto and proportionality can be and should be implemented in Kosovo. The implementation of segmental autonomy may be subject to the reservations that I have expressed above. I concur with Lijphart who said that “[t]he essential characteristic of consociational democracy is not so much any particular institutional arrangement as the deliberate joint effort by the elites to stabilize the system.”<sup>75</sup> My point here is not that institutional arrangement has to be defined by elites (this pattern can be considered undemocratic), but that there is no one strictly determined structure for consociationalism, which has to be equally followed in all situations. In each case the design of the elements and institutions will be contingent on the circumstances of the country in question. At the same time, the elements of consociationalism have to be implemented in a way that allows preserving the internal checks and balances among the elements of consociationalism.<sup>76</sup>

### **C. Peace-building and consociationalism: a mutually beneficial union?**

Both the peace-building concept and the consociational model have their limitations in relation to reconstruction of divided societies. The peace-building concept does not incorporate techniques to accommodate tensions in ethnically divided societies and because of that an international administration may fail to eliminate the sources of a conflict – dictatorship by the majority and exclusion of minorities. Consociationalism provides for techniques of ethnic inclusion, but these techniques may not be implemented by the parties to a conflict without international pressure. Thus, peace-building complements consociationalism in terms of providing a framework for an international administration in a post-conflict zone and consociationalism adds important conciliatory techniques to the range of peace-building tools.

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<sup>74</sup> Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991) at 101.

<sup>75</sup> Arend Lijphart, “Consociational Democracy” (1969) 21 *World politics*, reprinted in Van Parijs *supra* note 59 at 307.

<sup>76</sup> For example, proportionality has to be adopted not only in relation to one state institution or branch of government, but all of them when applicable, that is, not only the legislature should be based on proportionality, but also the composition of the cabinet and the election of a president as well as formation of the judiciary and the police.

The strength of the interrelation of peace-building and consociationalism is in the exchange between theory and practice. The consociational model is suggested as a possible way for the resolution of the potential democratic deficit in Kosovo associated with majority government. The activities of peace-building missions give feedback about the practical value of consociational mechanisms. Moreover, the empirical evidence from such missions contributes new aspects to the theoretical model of consociationalism (for example, the necessity to apply proportionality not only in representative organs, but also for the creation of the judiciary and the police<sup>77</sup>).

Even the combination of peace-building and consociationalism does not automatically mean success for a peace-building mission. Consociationalism, proposed as a solution for the “ethnic neutrality” of peace-building, has its limitations, which may even be intensified by the circumstances of post-conflict Kosovo. Although I have already expressed a critical stance on the proposed theoretical model, the conclusion about its workability and its limitations in Kosovo and similar situations will ultimately be reached through the further analysis of this thesis.

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<sup>77</sup> For the discussion of these issues see, Chapter IV.

## **Chapter II**

### **General Issues of Peace-building**

A painter usually starts a picture with the choice of several basic colours and their correlation. The three or four main spots of colour are the basis for the further work on details and overtones and a guideline for the harmonic combination of images and perspectives in the picture.

I want to start my picture of peace-building in Kosovo with the presentation of the basic “colours” of this peace operation: the circumstances, which led to the establishment of the mission, the legal basis of the mission, and the major problems that have been and may be encountered during the exercise of peace-building activities there.

This Chapter combines a theoretical discussion of peace-building with the analysis of practical aspects of the UNMIK activities. Section A provides an overview of the major events in Kosovo that happened since 1989. Based on the facts of Section A, Section B reveals major legal and moral controversies of peace-building which should be borne in mind during a further discussion of self-government and judicial reform in Kosovo. It also further defines the characteristics required of a peace-building mission and analyzes how well the UNMIK meets these requirements.

#### **A. The Establishment and Powers of the UNMIK**

What follows is not a comprehensive analysis of the development of the Kosovo conflict.<sup>78</sup> Rather, these are the basic facts that create a necessary context for the understanding of peace-building activities in Kosovo.<sup>79</sup>

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<sup>78</sup> For detailed analysis of the events in Kosovo, see: Tim Judah, *Kosovo War and Revenge* (New Heaven: Yale University Press, 2000); Michael Ignatieff, *Virtual War: Kosovo and Beyond* (Toronto: Viking, 2000); Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (London: Hurst & Company, 1998); Noel Malcolm, *Kosovo: A Short History* (New York : New York University Press, 1998).

<sup>79</sup> The debate about the lawfulness of the actions of the Serbian authorities in Kosovo, the scale of ethnic violence (e.g., whether it amounted to ethnic cleansing or genocide), the nature of the Kosovo struggle (whether it can be viewed as self-determination movement), the lawfulness of the NATO intervention and related issues are beyond the scope of this paper. For the discussion of these problems, see: Michael Smith “NATO, the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?”

### *1. Statement of facts*<sup>80</sup>

Historically, the Province of Kosovo is of great importance for both Serbs and Albanians. For Serbs, Kosovo is the birthplace of the Serb nation.<sup>81</sup> The Albanians' claim to Kosovo is based on historical connection: the Albanian national movement started in Kosovo in 1878 and since that time Kosovo is considered one of the centers of Albanian nationalism.<sup>82</sup> Another factor is demographics. For centuries Kosovo has been populated predominantly by Albanians. During 1953-1991 the Albanian population in Kosovo increased from 64.9% to 82.2%.<sup>83</sup> The growth of the Albanian part of the population was accompanied by a significant decrease in numbers of Serb, Montenegrin, Croat and Turk minorities. By 1998 Albanians made up more than 90% of Kosovo's population.<sup>84</sup>

In 1974, under President Tito's rule, Kosovo obtained the status of an autonomous region within Serbia. The next several years were characterized by growing "Albanization" of the political, economic and cultural life of Kosovo. The positive discrimination pursued by formerly disadvantaged Albanians<sup>85</sup> was experienced by other ethnic groups as injustice and contributed to their sense of insecurity.<sup>86</sup>

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(2001) 27 *Army Law* 1; Richard B. Bilder, "Kosovo and the 'New Interventionism': Promise or Peril?" (1999) 9 *J. Transnat'l L. & Pol'y* 153; Julie Mertus, "Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo" (2000) 41 *Wm. & Mary L. Rev.* 1743; Walter Gary Sharp, "Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Protect Kosovo" (1999) 23 *Md. J. Int'l L. & Trade* 295; "Editorial Comments: NATO's Kosovo Intervention" (1999) 93 *AJIL* 824. In the description of the events in Kosovo I do not take either pro-Albanian or pro-Serb side. My goal here is briefly summarize the facts of the conflict as they were presented by different authors.

<sup>80</sup> For a flow chart of the major events, see Appendix 1.

<sup>81</sup> The significance of Kosovo for the Serb history is seen first of all in the battle between the Serb knights and the Ottoman Turks that took place in Kosovo Polje on 28 June 1389. The loss of the battle led to the establishment of the Ottoman Turk rule over the Balkans. Serbs viewed the collapse of the Serb medieval state as one of the central events in their history and found its explanation in the Battle of Kosovo. "The epic cycle of Kosovo became the longest, most beautiful and most important of all the Serbian epics. These epic myths ... become institutionalized as a part of the ...Serbian national programme." See, Vickers, *supra* note 78 at 12-15.

<sup>82</sup> M. Smith, *Kosovo: Background and Chronology*, online: Federation of American Scientists Homepage <http://www.fas.org/man/dod-101/ops/docs99/g72-mas-compl.htm> (date accessed: 20 January 2001).

<sup>83</sup> Judah, *supra* note 78 at 313.

<sup>84</sup> Smith, *supra* note 82.

<sup>85</sup> After World War II the Yugoslav government suppressed Kosovo Albanians in many ways. The land of Albanian farmers was given to numerous Serbian and Montenegrin families, which were encouraged to settle in Kosovo. Albanians were discriminated in employment. Very few

In 1981-82 a series of riots calling for “unified Albania” and “Kosovo Republic” shook the Province.<sup>87</sup> The riots were often accompanied by abusive actions against Serbs and Montenegrins, including beatings and the destruction of property. At that point, Milosevic exploited the general instability in the Province and the growing concerns of Serbs about their position in Kosovo to increase his popularity among the Serb population. He expressed strong support for the Serbs of Kosovo and willingness to help in fighting “Albanization,”<sup>88</sup> what gained him wide support among Serbs.

After becoming a Serb president in 1989, Milosevic supported a series of measures to limit Kosovo autonomy. The abolition of the Kosovo autonomy started with the amendments to the Constitution of the Socialist Republic of Serbia in March 1989.<sup>89</sup> The same month, the work of the Kosovo Executive Council and the Kosovo Assembly was suspended. In July 1990 the Serb National Assembly took administrative and executive control over the Province.<sup>90</sup> In September 1990 the process of abolishing the de jure and de facto Kosovo autonomy was completed with the adoption of a new Serb Constitution, which defined Kosovo as a region within Serbia.

Seeking to reinforce control over Kosovo, the Serb government used various means of oppression against the Albanian population, ranging from firing Albanians from public sector positions and reducing funding for Kosovo public institutions to arrests, beatings and other forms of intimidation. In turn, the Kosovars refused to recognize the legitimacy of the Serb direct rule over Kosovo. They formed parallel political, economic and social institutions, including a shadow government, political parties, schools, trade unions and hospitals.<sup>91</sup> The Kosovars managed to create a highly coordinated system of

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schools and educational and cultural institutions provided instruction in Albanian. See, *Expulsions of Albanians and Colonization of Kosova*, online: < <http://www.ess.uwe.ac.uk/Kosovo/chap3.htm#n4>> (date accessed: 1 August 2001)

<sup>86</sup> Vickers, *supra* note 78 at 223.

<sup>87</sup> *Ibid.*, at 198.

<sup>88</sup> Vickers, *supra* note 78 at 229.

<sup>89</sup> *Ibid.*, at 234.

<sup>90</sup> *Ibid.*, at 245.

<sup>91</sup> *Ibid.*

institutions, which provided for nearly all services “except for their own army and garbage collection.”<sup>92</sup>

In 1991 the Kosovo shadow parliament proclaimed Kosovo independence, which was further supported on a secret referendum by 99.87% of the eligible voters.<sup>93</sup> In the 1992 parliamentary and presidential elections to the Kosovo parallel structures, the Democratic League of Kosovo (LDK) - one of the central actors of the Albanian opposition - won the majority of votes. The movement’s leader Rugova was elected the president of Kosovo.

During 1992-1994, the Serb oppression over Kosovo grew. Rugova’s policy of peaceful resistance and reliance on the international support failed to change the situation. His tactics were challenged by more radical members of the Kosovo community, who advocated armed resistance to the Serb administration. Among them was the Kosovo Liberation Army (KLA), which adopted an aggressive policy of attacking the Serb police and security forces and assassinating Serb officials. Quickly gaining support among the population, the KLA soon became a force equally important to the LDK. By 1998 it controlled about 25-30 percent of the Province’s territory.<sup>94</sup> After the Serb withdrawal from Kosovo in 1999 the KLA assumed de facto authority in many Kosovo municipalities<sup>95</sup> and continued to play an active role in Kosovo political life after the deployment of the UNMIK.

Due to popular support, well-developed structures and substantial financial resources, the KLA-tied organizations and the LDK remain the most influential political entities in Kosovo. They played a central role in the self-government structures created by the UNMIK and led over other political parties during the 2000 municipal elections. A detailed discussion of these issues is to follow in Chapter III.

The year 1998 was marked by intensified violence from both the Serb and Kosovar sides. The strengthened KLA undertook several massive operations against the Serb police.

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<sup>92</sup> Julie Mertus, “Nationalism and Nation-Building: Milosevic Turns to Montenegro and Kosovo” (1994) 26 NYU J. Int’l L. & P. 511 at 519.

<sup>93</sup> Vickers, *supra* note 78 at 251.

<sup>94</sup> *Assessment of the Situation of Ethnic Minorities in Kosovo*, OSCE Report, September 2000, at 3, online: OSCE Homepage <http://www.osce.org/kosovo/publications/pdf/mibrep.pdf> (date accessed: 12 February 2001).

<sup>95</sup> *October 28, 2000 -- Municipal Elections in Kosovo: A Human Rights Watch Backgrounder*, Human Rights Watch Report, November 2000, online: Human Rights Watch Homepage [www.hrw.org/press/2000/10/kosovo1020-bck.htm](http://www.hrw.org/press/2000/10/kosovo1020-bck.htm) (date accessed: 10 February 2001).

In response, the Serb security forces conducted a series of raids against Albanians in the Drenica region. Later on, numerous battles for effective control over the parts of Kosovo arose between the Serb and Yugoslav troops and the KLA. The conflict was turning into a guerrilla war.<sup>96</sup> The victims of clashes between the KLA and the security forces have commonly been the civilian population.<sup>97</sup> Thousands of Kosovars, frightened by the escalating hostilities, poured into neighbouring Albania and Montenegro. According to the UNHCR report, in the beginning of 1998 about 350,000 people were displaced or fled abroad.<sup>98</sup>

Increased violence and intensive flows of refugees from Kosovo raised concerns within the international community about stability in the Balkan region. In 1998 the Security Council adopted three resolutions on the situation in Kosovo. The first one, Resolution 1160<sup>99</sup> of March 1998, condemned the excessive use of force by the Serb police against civilians in Kosovo and the terrorist acts of the KLA. It called for an immediate dialogue between the Belgrade authorities and the Kosovo Albanian community and imposed an arms embargo on the Federal Republic of Yugoslavia (FRY), including Kosovo.<sup>100</sup> The situation, however, continued to worsen. In September 1998 the Security Council, concerned with the increased fighting and mass flow of refugees from Kosovo, adopted Resolution 1199.<sup>101</sup> It demanded withdrawal of the FRY security forces from the Province. NATO was ready for air strikes if the FRY failed to comply with the demands of the Security Council. On 4 October 1998 Milosevic claimed that he was withdrawing his forces from Kosovo. Several days later, after negotiations with the US envoy Richard Holbrooke, Milosevic made further

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<sup>96</sup> *Focus on Kosovo: A Timeline of Tension*, online: CNN Homepage < <http://www.cnn.com/SPECIALS/1998/10/kosovo/timeline/#1998> > (date accessed: 3 March 2001).

<sup>97</sup> *German Foreign Office Report on Kosovo* (November 1998), online: Balkania Homepage < [wysiwyg://5/http://members.tripod.com/Balkania/resources/history/gfo\\_report.html](http://members.tripod.com/Balkania/resources/history/gfo_report.html) > (date accessed: 4 July 2001).

<sup>98</sup> *Refugees Magazine*, issue 116, 1999, UNHCR publications, online: UN High Commissioner for Refugees Homepage < <http://www.unhcr.ch/pubs/rm116/rm11603.htm> > (date accessed: 4 July 2001).

<sup>99</sup> Security Council Resolution 1160, S/RES/1160 (1998), online: United Nations Homepage <http://www.un.org/Docs/scres/1998/sres1160.htm> (date accessed: 12 March 2001).

<sup>100</sup> Security Council Resolution 1160, *supra* note 99, para. 4 & 8.

<sup>101</sup> Security Council Resolution 1199, S/RES/1199 (1998), online: United Nations Homepage <http://www.un.org/Docs/scres/1998/sres1199.htm> (date accessed: 12 March 2001).



concessions. He gave his consent to the deployment of the OSCE Kosovo Verification Mission (KVM) and of a NATO-led aerial observer mission.<sup>102</sup>

Soon it appeared that, in breach of the requirements of SCR 1199, not all Serb forces left Kosovo and even some new troops were deployed there. On 24 October 1998, the Security Council adopted Resolution 1203 where it determined that the situation in Kosovo constituted a threat to international peace and security and demanded the FRY to comply with the previous resolutions.<sup>103</sup> The same day the Supreme Allied Commander Wesley Clark and the NATO Military Committee Chairman Klaus Naumann warned Milosevic that NATO would launch air strikes unless Serb troops were withdrawn from Kosovo by October 27. The threat was suspended after Milosevic started withdrawal of the Yugoslav troops.

A series of international diplomatic efforts that followed in November-December 1998 failed to promote the FRY - Kosovo Albanian dialogue. The situation deteriorated after the massacre of 40 unarmed Kosovo Albanian civilians in the village of Racak on 15 January 1999.<sup>104</sup> Seeing that fighting in Kosovo continued, the six-nation Contact Group<sup>105</sup> started peace talks with the Serb and Albanian leaders in Rambouillet (France) in February 1999. The talks lasted for 17 days with a follow-on session in Paris in mid-March. The negotiations broke down on March 19 after the refusal of the Serb delegation to sign an agreement.

On 24 March 1999, following the Serb rejection of a diplomatic solution, NATO launched a 78-day air strike campaign against the FRY. Throughout the period of the NATO air strikes the international community continued its diplomatic efforts to resolve the Kosovo crisis. In May 1999 the Group of Eight worked out principles for the settlement of the conflict, which the FRY accepted on June 3. On June 9 the Military Technical Agreement, concerning the deployment of the international security presence and the FRY

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<sup>102</sup> Smith, *supra* note 82.

<sup>103</sup> Security Council Resolution 1203, S/RES/1203 (1998), online: United Nations Homepage <http://www.un.org/Docs/scres/1998/sres1203.htm> (date accessed: 12 March 2001).

<sup>104</sup> More than 40 ethnic Albanians were executed by the Serb police in Racak. For more details, see *Massacre in Kosovo*, 19 January 1999, online: BBC Homepage < [http://news.bbc.co.uk/hi/english/world/europe/newsid\\_256000/256364.stm](http://news.bbc.co.uk/hi/english/world/europe/newsid_256000/256364.stm) > (date accessed: 8 August 2001).

<sup>105</sup> The Contact Group included France, Germany, Italy, Russian Federation, United Kingdom, and the United States. See, Stefan Toebst, *Conflict in Kosovo: Failure of Prevention? An Analytical Documentation, 1992-1998*, online: European Centre for Minority Issues Homepage, < [http://www.ecmi.de/doc/download/working\\_paper\\_1.pdf](http://www.ecmi.de/doc/download/working_paper_1.pdf) > (date accessed: 3 August 2001).

withdrawal from Kosovo was signed by both the FRY and NATO. The next day the NATO air strikes were suspended. On June 10 the Security Council adopted Resolution 1244<sup>106</sup> based on the G-8 principles for the settlement of the conflict and drafted by the G-8 foreign ministers.

The deployment of the international security presence started on June 13. On June 20 the Special Representative ad interim – a temporary head of the international civil presence - Sergio Vieira de Mello, arrived in Kosovo.

The deployment of the international presence took place under difficult circumstances. Public service structures, including schools, telephone communication, public transport were largely inoperable.<sup>107</sup> Many Kosovo municipalities suffered from the shortage of water and electricity. Kosovo's industry and agriculture were seriously debilitated during the conflict. The payments system and financial sector did not function. Commercial activity was not likely to be revived in a short term because of instability, lack of financial resources and other impediments.<sup>108</sup>

In sum, the political, economic and humanitarian situation in Kosovo after the bombing was disastrous. The economy and infrastructure were seriously damaged. The state institutions, including courts, law enforcement and security forces, were inoperable. In the circumstances of a security vacuum, local military and political forces were competing to expand their de facto control over the Kosovo territory. An additional challenge for the international community was the absence of sufficient previous experience in post-conflict rehabilitation<sup>109</sup> and the lack of a clear peace-building strategy that could be readily applied in Kosovo.

These circumstances should be kept in mind during the analysis of the overall effectiveness of the UNMIK activities. The difficulty of the situation is not a justification for mistakes of the UNMIK mission; but it is a vital factor in determining whether an

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<sup>106</sup> Security Council Resolution 1244, S/RES/1244 (1999), online: United Nations Homepage <<http://www.un.org/Docs/scres/1999/sres1244.html>> (date accessed: 16 September 2000).

<sup>107</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/1999/779, 12 July 1999, para. 44, online: United Nations Homepage at 7 (date accessed: 12 November 2000) [hereinafter *Report of the Secretary-General of 12 July 1999*].

<sup>108</sup> *Ibid.*, para. 16 at 4.

<sup>109</sup> The missions in, for example, Somalia and Bosnia involved many of the issues dealt with in Kosovo, but the tasks of those missions were not that comprehensive.

intervention was worthwhile, and whether the mission provided significant improvement in public and private life of the local population.<sup>110</sup>

## *2. Security Council Resolution 1244*

Security Council Resolution (SCR) 1244 is the main source of authority for the international civil and security presence in Kosovo. Adopted on 10 June 1999, after the cessation of the NATO bombing, the Resolution outlines immediate measures for the improvement of the situation in Kosovo, as well as long-term measures for the future development of Kosovo. The Security Council determined the situation in Kosovo as continuing to constitute a threat to international peace and security and authorized the employment of measures under Chapter VII.<sup>111</sup> Those measures included the deployment of the international security and international civil presence. The Resolution recognized the necessity for “substantial autonomy and meaningful self-determination for Kosovo.”<sup>112</sup> At the same time, it reaffirmed the commitment of the UN Member states to the sovereignty and territorial integrity of the FRY.<sup>113</sup>

The Resolution is based on a statement of the meeting of the G-8 Foreign Ministers on the political solution to the Kosovo crisis and the principles for resolution of the Kosovo crisis accepted by Belgrade on June 3, 1999. (These documents are included in the Resolution, as Annexes 1 and 2 respectively.) The Resolution reaffirmed the consent of the FRY to the principles for the resolution of the Kosovo crisis, namely, the withdrawal of the FRY from Kosovo, the deployment of the international security and civil presence and the transfer of the authority over the Province to the international transitional administration. It appears that the primary authority for the establishment of an international administration and the obligation of the FRY for withdrawal stems not from SCR 1244, but from the principles for resolution of the Kosovo crisis, which the FRY accepted on June 3, 1999.<sup>114</sup> At the same time, in relation to other UN Member

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<sup>110</sup> A detailed assessment of these issues is to follow in Chapters III and IV.

<sup>111</sup> Security Council Resolution 1244, *supra* note 106, preamble.

<sup>112</sup> *Ibid*

<sup>113</sup> *Ibid*.

<sup>114</sup> According to Article 25 of the UN Charter, the UN Members are obliged to accept and carry out the decisions of the Security Council. At the time of the issuance of SCR 1244, the FRY was

States and international organizations, SCR 1244 is a source of an obligation to assist in post-conflict reconstruction. The resolution is also the primary source for the mandate of a peace-building mission.

This example points out the distinction between the sources of obligations of a host state, obligations of the UN Member States and the source of the peace-building mission's mandate. Each of the sources will be further discussed during the analysis of the general legal basis for peace-building in Section B.

SCR 1244 clearly separated the civil and security components of the international mission.<sup>115</sup> The international security presence known as the Kosovo Force (KFOR) is led by NATO. It was entrusted with monitoring the cease-fire, ensuring withdrawal of the Serb forces from Kosovo, demilitarization of the KLA, ensuring public safety until the international civil presence could take responsibility for this task, etc.<sup>116</sup>

The international civil presence is structured in a form of an interim administration "under which the people of Kosovo can enjoy substantial autonomy"<sup>117</sup> within the FRY. The Secretary-General and relevant international organizations<sup>118</sup> were put in charge of establishing the international civil presence. The civil presence has broad responsibilities in political, economic and humanitarian spheres. In particular, they include promotion of substantial autonomy and self-government in Kosovo, general administration of the Province, economic reconstruction, maintaining law and order, promoting human rights, assuring safe return of refugees, etc.<sup>119</sup> The administration is headed by the Special Representative of the UN Secretary-General (SRSG).

To sum up, SCR 1244 played the following important functions in relation to the exercise of peace-building in Kosovo: 1) it reaffirmed the FRY's obligation to withdraw from Kosovo and its consent to the international deployment. These two created

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not a member of the United Nations and, thus was not clearly bound by the requirements of SCR 1244.

The Federal Republic of Yugoslavia was admitted as a member of the United Nations by General Assembly Resolution A/RES/55/12 of 1 November 2000, online: United Nations Homepage <http://www.un.org/Overview/unmember.html> (date accessed: 28 January 2001).

<sup>115</sup> No such distinction was drawn in either *An Agenda for Peace*, the Supplement to *An Agenda for Peace* or the Brahimi Report.

<sup>116</sup> Security Council Resolution 1244, *supra* note 106, para. 9.

<sup>117</sup> Security Council Resolution 1244, *supra* note 106, para 10.

<sup>118</sup> The Resolution does not specify which organizations participate in this process.

<sup>119</sup> Security Council Resolution 1244, *supra* note 106, para 11.

necessary preconditions for the establishment of the UNMIK. 2) It created the obligations of the UN Member States in relation to the Kosovo reconstruction, thus, providing the basis for the comprehensive international involvement in the Province. 3) It outlined the mandate of the international civil and security presence, which served as a starting point for the international reconstruction of Kosovo.

### *3. Competence of the UNMIK*

SCR 1244 has set basic tasks and guidelines for the international action in Kosovo. The practical method of implementing SCR 1244 was outlined by the UN Secretary-General in the Report to the Security Council on July 12, 1999. The Report provided a working plan for the international administration in Kosovo. In particular, it set out the UNMIK structure; outlined the competencies of the administration as a whole as well as of its pillars; and defined the stages for the implementation of the UNMIK mandate.

The definition of all these elements required interpretation of SCR 1244 by the UN Secretary-General. In certain respects, he interpreted the Resolution's provisions very broadly. For example, the Report expressly stated that all the legislative and executive power, as well as the authority to administer the judiciary, is vested with the UNMIK. In contrast, SCR 1244 refers to the competence of the international civil administration in more vague terms: "provid[ing] transitional administration," "establishing and overseeing the development of provisional democratic self-governing institutions." The Resolution did not specifically mention what powers an international administration would have and how it would provide transitional administration. Thus, it is questionable whether the Security Council meant to confer the full legislative and executive authority on the UNMIK.

Another example of the broad interpretation of SCR 1244 is the definition of the authority of the Special Representative of the Secretary General (SRSG). According to the Report, all the authority vested with the UNMIK is exercised by the SRSG.<sup>120</sup> All

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<sup>120</sup> SCR 1244 does not contain any reference to the SRSG as the main official in Kosovo. In this respect, the Secretary-General followed the framework for peace-building missions suggested in the Supplement to An Agenda for Peace: "In a country ruined by war, ... the [UN] programmes, funds, offices and agencies... gradually take over responsibility from the peace-keepers, with the

major legislative and executive powers – to issue legislative acts, change, repeal or suspend existing laws and to appoint and remove any official of the international administration - are concentrated in the hands of the SRSG. In addition to that, the SRSG is the final authority to interpret SCR 1244.<sup>121</sup> This gives him almost unlimited power over the Province.

The broad interpretation of SCR 1244 by the Secretary-General is somewhat problematic. The question is two-fold: the authority of the Secretary-General to provide the interpretation of Security Council Resolutions; and the limits of such interpretation (how broad it can be). A certain prototype for the role of the Secretary-General in interpreting SCR 1244 may be derived from the Supplement to An Agenda for Peace, which proposes the transfer of decision-making power from the Security Council to the General Assembly or other inter-governmental organization.<sup>122</sup> Still, even this provision cannot be considered a sufficient basis for the concentration of authority for the interpretation within a unilateral body like the Secretary-General.

The limits of the interpretation can be defined by balancing the considerations of practicality and legitimacy. On the one hand, SCR 1244 does not provide sufficient details about the institutional organization of the mission and the division of power between its elements. Then, from practical point of view, a detailed interpretation of the Resolution's provisions is necessary for the effective implementation of the UNMIK mandate. On the other hand, extensive interpretation by the Secretary-General can be viewed as substituting the legislative authority of the Security Council and developing the Resolution's provisions beyond their original meaning and, thus, lacking legitimacy. The question of legitimacy becomes important in two respects: 1) the interpretation of the Secretary-General provided the basis for the UNMIK structure, division of powers among

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resident coordinator in due course assuming the coordination functions temporarily entrusted to the special representative of the Secretary-General." See, *ibid.*

According to the Report of 12 July 1999, "the Special Representative of the Secretary-General as the head of UNMIK, is the highest international civilian official in Kosovo. He will enjoy the maximum civilian executive powers envisaged and vested in him by the Security Council in its resolution 1244 (1999), and will also be the final authority on their interpretation. ... , the Special Representative will facilitate a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords." See, *Report of the Secretary-General of 12 July 1999*, *supra* note 107.

<sup>121</sup> *Ibid.*, para 44 at 8.

<sup>122</sup> *Supplement to An Agenda for Peace*, *supra*, note 5, para. 54.

the pillars, timeline for the reconstruction, etc. and, thus the legitimacy of that interpretation affects the legitimacy of the very UNMIK; 2) whether such a pattern of the Secretary-General's interpretation should be followed in regard to the future peace-building missions.

#### *4. The UNMIK structure*

Peace-building is a multidimensional activity which includes humanitarian assistance, democratization, economic reconstruction, etc. Even such a well-developed organization as the UN cannot manage all the tasks of peace-building alone. Bearing in mind that "regional entities can enhance the efficiency and effectiveness of the UN efforts for peace,"<sup>123</sup> several organizations were united under the UNMIK framework to carry out their activities in Kosovo in "...an integrated manner with a clear chain of command."<sup>124</sup>

The structure of the UNMIK was defined by the Report of the UN Secretary-General of 12 July 1999. According to it, the UNMIK comprises four major components (or pillars). Each is responsible for a particular area of reconstruction: the UN – for civil administration; the UNHCR – for humanitarian assistance; the OSCE – for institution-building; the EU – for economic reconstruction. Each pillar is divided into a number of functional elements.

The civil administration led by the UN has three divisions:

- 1) public administration – responsible for the establishment of multi-ethnic governmental structures;
- 2) police (Kosovo Police Service) - responsible for law and order;
- 3) judicial affairs division – entrusted with the re-establishment of the Kosovo judiciary.<sup>125</sup>

The responsibilities of the institution-building pillar (the OSCE) are divided into three major categories – democratization and institution building, elections, and human

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<sup>123</sup> *Report of the Secretary-General of 12 July 1999, supra note 107.*

<sup>124</sup> *Ibid.*, para. 43.

<sup>125</sup> *Ibid.*, para. 55-78. The responsibilities of the judicial affairs division and of the UNMIK Police will be discussed in Chapter IV.

rights.<sup>126</sup> The tasks of the pillar are distributed among five divisions: Police Training and Education, Democratization, Human Rights and Rule of Law, Media Affairs and Elections.<sup>127</sup> The Democratization and Elections divisions are responsible for the promotion of citizens' involvement in social and political life in Kosovo and the development of self-government. The Human Rights division monitors the human rights situation in Kosovo. The Rule of Law segment provides logistical and material support to courts. The Media Affairs department assists in the development of professional and independent media.

The humanitarian component of the UNMIK, led by the UNHCR, includes divisions responsible for the provision of humanitarian assistance and mine action. It is primarily responsible for providing shelter, food and medical assistance to returnees and coordination of mine support action in Kosovo.<sup>128</sup>

The European Union is the key player in the UNMIK economic reconstruction. The EU is responsible for planning the reconstruction of Kosovo, preparing economic policies and coordinating the activities of various donors and international financial institutions working in Kosovo.<sup>129</sup>

The interrelation between the UNMIK components is characterized by both cooperation and independence of the pillars. Structurally and in terms of resources and responsibilities, the pillars maintain substantial independence. This tendency may be observed, for example, the representation of the pillars in Kosovo municipalities. In the municipalities, the UNMIK is represented not as a single entity, but as a network of the offices of its pillars (See, Table 1).

At the same time, the idea behind the establishment of the UNMIK was to increase the effectiveness of peace-building through uniting the resources and expertise of various organizations. These organizations reinforce their activities through cooperation. For example, the OSCE Department of Human Rights and Rule of Law is a key player in the Task Force on Minorities established by the UNHCR and the Task

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<sup>126</sup> *Ibid.*, para. 79.

<sup>127</sup> *Annual Report on OSCE Activities* (2000), online: OSCE Homepage [http://www.osce.org/docs/english/misc/anrep00e\\_activ.htm#Anchor-1.-41834](http://www.osce.org/docs/english/misc/anrep00e_activ.htm#Anchor-1.-41834) (date accessed: 8 April 2001).

<sup>128</sup> *Report of the Secretary-General of 12 July 1999*, *supra* note 107, para. 92-100.

<sup>129</sup> *Ibid.*, para. 107.



Force on Juvenile Justice established by the UNICEF.<sup>130</sup> The Rule of Law division maintains intensive contacts with the Administrative Department of Justice of the UN-led Civil Administration, which is responsible for the overall management of the judicial system and correctional service. The OSCE Human Rights division has a unique position in relation to Pillar II – the Civil Administration. Being structurally a part of the UNMIK, the mandate of Human Rights division includes a quasi-independent authority to monitor the observation of human rights in Kosovo, including the judicial system administered by Pillar II.<sup>131</sup> In particular, the OSCE legal system monitoring mandate includes a responsibility to report on:

- the current statistics relating to the criminal justice system;
- systematic violations of international law;
- gross violations of fair trial standards in individual cases that must be immediately remedied.<sup>132</sup>

The extensiveness of the activities of the pillars in the municipalities differs. Table 1 demonstrates that the UN Civil Administration and the OSCE Pillar, which have offices in every municipality, are likely to be more involved in managing the municipal affairs comparing to the UNHCR or the EU. This may be seen as a sign of the currently leading role of the UN-led and the OSCE-led pillars in the UNMIK framework.

**Table 1. UNMIK Pillars**

Municipality	UN Civil Administration	OSCE	UNHCR	EU

<sup>130</sup> *Kosovo: A Review of the Criminal Justice System*, OSCE Report, February – July 2000, at 6, online: OSCE Homepage <

[http://www.osce.org/kosovo/documents/reports/justice/criminal\\_justice.pdf](http://www.osce.org/kosovo/documents/reports/justice/criminal_justice.pdf) > (date accessed: 3 February 2001) [hereinafter *A Review of the Criminal Justice System*].

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

Dečan/Dečani	6 staff members	Covered from Pec	Covered from Pec	Covered from Pec and Pristina
Ferizaj/Uroševac	11 internationals, 9 locals	6 internationals, 23 locals		
Fushë Kosovë/Kosovo Polje	6 internationals, 11 locals	8 internationals, 23 locals	1	1
Gjakovë/Đakovica	8 internationals, 6 locals	6 international, 18 local	6 international, 15 local	
Gjilan/Gnjilane	82 internationals, 187 locals	17 internationals, 81 locals	8 internationals, 12 locals	
Glogovac/Glogovac	5 internationals	2 internationals, 11 locals	1 international	
Istog/Istok	7 internationals, 6 locals	5 internationals, 20 locals	Covered from Pec	
Klinë/Klina	5 internationals, 3 locals	4 internationals, 18 locals	2 internationals	
Kaçanik/Kaçanik	9 internationals, 10 locals	5 internationals, 23 locals	Covered from Gnjilane	
Leposavić/Leposaviq	2 internationals, 1 locals	4 internationals, 14 locals		1 EU/UNMIK expert
Lipjan/Lipljan	4	6	1	

	<b>internationals, 13 locals</b>	<b>internationals, 23 locals</b>	<b>international, 1 local</b>	
<b>Malishevë/Mališevo</b>	<b>6 internationals, 100 locals</b>	<b>Covered from Rahovac</b>		<b>1</b>
<b>Novobërdë/Novo Brdo</b>	<b>2 internationals, 3 locals</b>	<b>1</b>	<b>1</b>	
<b>Obiliq/Obilić</b>	<b>5 internationals, 3 locals</b>	<b>Covered from Kosovo Polje</b>	<b>1</b>	<b>1</b>
<b>Pejë/Peć</b>	<b>18</b>	<b>86</b>		<b>13</b>
<b>Podujevë/Podujevo</b>	<b>8 internationals, 6 locals</b>	<b>5 internationals, 30 locals</b>		
<b>Prizren/Prizren</b>	<b>7 internationals, 5 locals</b>	<b>18 internationals, 61 locals</b>	<b>5 internationals, 13 locals</b>	<b>3 international s</b>
<b>Rahovec/Orahovac</b>	<b>5 internationals</b>	<b>5 internationals</b>	<b>Covered from Djakovica</b>	
<b>Shtime/Štimlje</b>	<b>4 internationals, 7 locals</b>	<b>2 internationals, 2 locals</b>	<b>Covered from Pristina</b>	
<b>Štrpce/Shtërpçë</b>	<b>4 internationals, 1 locals</b>	<b>5 internationals, 20 locals</b>	<b>Covered from Urosevac</b>	
<b>Suharekë/Suva Reka</b>	<b>5 internationals</b>	<b>9 internationals, 4 locals</b>		<b>5 international s</b>
<b>Viti/Vitina</b>	<b>6</b>	<b>5</b>	<b>1</b>	

	<b>internationals, 4 locals</b>	<b>internationals, 20 locals</b>		
<b>Vushtrri/Vučitrn</b>	<b>9 internationals, 9 locals</b>	<b>5 internationals, 19 locals</b>		<b>3 international s, 2 locals</b>
<b>Zubin Potok/Zubin Potok</b>	<b>2 internationals, 4 locals</b>	<b>2 internationals, 4 locals</b>		
<b>Zvečan/Zvečan</b>	<b>2 internationals, 4 locals</b>	<b>3 internationals, 21 locals</b>		

Source: Profiles of Kosovo Municipalities (2000), online: OSCE Homepage [http://www.osce.org/kosovo/documents/reports/municipal\\_profiles/](http://www.osce.org/kosovo/documents/reports/municipal_profiles/) (date accessed: 12 May 2001).

A certain amount of criticism has been expressed in relation to the involvement of many international organizations in the exercise of administration in Kosovo. For example, Ruth Wedgwood and Harold Jacobson view a “hodgepodge of international agencies”<sup>133</sup> involved in reconstruction as one of the factors adding to the UNMIK disability in post-conflict reconciliation. “The overlay of redundant officials, the rate-limiting pace of the most laggard political process, the ability to play one agency against the other, and the absence of singular responsibility for the mission, all conspire to hobble the project of reconstruction.”<sup>134</sup> At this point we do not have enough information to assess whether the involvement of many agencies is actually effective or not. The expressed criticism apparently is rational and will be relevant to later discussion about the motives for the involvement of international organizations and states in peace-building.

<sup>133</sup> Ruth Wedgwood & Harold K. Jacobson, “Symposium: State Reconstruction After Civil Conflict” (2001) 95 AJIL 1 at 2.

<sup>134</sup> Wedgwood & Jacobson, *supra* note 133 at 3.

### **Interim conclusion**

The information presented in the preceding sections is sufficient to permit preliminary conclusions about the conformity of the UNMIK's structure with the characteristics of peace-building identified in Chapter I. This analysis will be further expanded in the next section.

**First, comprehensive character.** The UNMIK was entrusted with wide range of varying tasks in all spheres of public life what confirms the comprehensive character of this undertaking.

**Second, institution-building as one of the essential tasks.** SCR 1244 expressly included the development of self-government (which implies creation of a particular institutional structure) as the purpose of the UNMIK. Moreover, the OSCE (also called the Institution-building pillar) was entrusted with institution-building in Kosovo. The large scale of UNMIK activities necessarily presupposes the transformation of the Kosovo government and society.

**Third, close cooperation between peace-builders and local parties.** Such cooperation is not only intended, but required by SCR 1244.<sup>135</sup> Numerous UNMIK arrangements, including creation of the mixed Kosovar-international organs, serve as evidence of the actual realization of this principle by the UNMIK.

**Fourth, close connection with peacekeeping.** There was no UN peacekeeping force in Kosovo before the deployment of the UNMIK, thus, no interrelation between peacekeepers and peace-builders could take place. I will return to the discussion about the rationality of the interrelation between peacekeeping and peace-building in the next section.

The Supplement to An Agenda for Peace provided that if no peacekeeping mission was previously established, a peace-building mission should be initiated by the Secretary-General. In contrast, in Kosovo the Secretary-General did not take the initiative for the establishment of the mission, but later he assumed a leading role in the

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<sup>135</sup> For example, SCR 1244 reads that the UNMIK "will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions." Such a formulation presupposes participation of the local parties in democracy-building. Further, the UNMIK Regulation on the Establishment of the Joint Interim Administrative Structure expressly reaffirms the participation of local parties in the provincial administration.

development of the UNMIK structure and allocation of the competencies between the UNMIK pillars. As mentioned before, the central controversy surrounding the role of the Secretary-General in the interpretation of SCR 1244 lies between practicality and legitimacy. From a practical perspective, it is convenient to spell out only the core functions of the international presence in the Security Council Resolution and to leave the job of adjusting the powers for their practical implementation to the Secretary-General. Such an approach permits the successful achievement of short-term goals –to define the responsible organizations quickly and to establish their tasks and framework under which they work. This, in turn, leads to a more rapid deployment and allows an immediate start of relief activities. However, the reverse side of such an interpretation is the problem of its legitimacy and its long-term impact on peace-building. An Agenda for Peace, the Supplement and the Brahimi Report are silent about the role of the Secretary-General in interpreting the Security Council resolutions. The only relevant provision is contained in the Supplement to An Agenda for Peace, which proposes the transfer of decision-making authority to the General Assembly or other intergovernmental organ. This provision shows intent to transfer the authority to a collective organ only. Then, the Secretary-General as a unilateral organ does not have enough legitimacy to assume any decision-making powers, including the interpretation of Security Council Resolutions, which serves the basis for the activities of a peace-building mission.

For me, legitimacy is a practical problem because it affects the long-term results of peace-building. The opinion of the local population about the international activities and re-established institutions as legitimate increases the chances that people will, first, support international activities during the first years of reconstruction and, second, that the population and its leaders will maintain the established structures after the withdrawal of the international presence. In a global perspective, the legitimacy of the international mission in Kosovo influences the future willingness of states to intervene in post-conflict zones and of host states to allow peace-building interventions. For this reason, I consider it necessary to examine the moral issues of peace-building (including legitimacy) in more detail in the next section.

## **B. Issues of Peace-building**

Due to its comprehensive nature, peace-building penetrates into the very foundations of a post-conflict society, attempting to transform its inside characteristics. The dramatic character of such transformation and its interventionist nature raises a number of legal, moral and practical concerns about peace-building.

The legal issues include the legal basis for the establishment of international administrations; the correlation of their establishment with the principle of state sovereignty; and the scope of authority that such administrations may assume. The moral aspect of peace-building touches upon the legitimacy of implementing “Western” ideas of democracy in post-conflict societies. The practical issues include assessing the correlation of the goals set for peace-building missions, the means chosen for their achievement and the results reached.

The section below briefly addresses the legal and moral issues. The practical problems of peace-building are considered in detail in Chapters III and IV, which describe the role of the UNMIK in the organization of elections and judicial reform.

### *1. Legal Issues*

The discussion of the legal basis for peace-building includes four core issues. First, what is the general legal basis for peace-building?<sup>136</sup> Second, does the UN have adequate authority to establish international administrations, like the one in Kosovo? Third, what is the place of peace-building on the scale of peace operations? Fourth, are there any limitations on the participation of regional organizations in peace-building?

Ideally, these issues should be addressed in the peace-building concept. However, as mentioned, the concept remains quite vague. Some of the mentioned issues were addressed in passing in *An Agenda for Peace* and the *Supplement to An Agenda for Peace*, but many issues of the legal basis of peace-building in particular those concerning the host state’s consent, the neutrality of peace-builders, and the scope of military powers, remain unresolved. The discussion below suggests some answers to these questions.

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<sup>136</sup> Please, differentiate the legal basis for peace-building from the peace-building concept discussed in Chapter I.

*a. General legal basis*

The UN Charter does not contain any express reference to peace-building. Similar to peacekeeping,<sup>137</sup> the concept of peace-building was developed through the initiatives of the UN Secretary-General<sup>138</sup> and subsequent UN practice. The definition of peace-building and its elements can be found in *An Agenda for Peace*, the Supplement to *An Agenda for Peace*, and the Brahimi Report.<sup>139</sup> These documents, however, do not provide any guidance about the procedural side of authorizing peace-building or the permissible scope of peace-building missions.<sup>140</sup> The Supplement to *An Agenda for Peace* only mentions that the Secretary-General should seek the government's consent to the deployment of a peace-building mission if no peacekeeping mission has been deployed in that zone before. *An Agenda for Peace* indicates the necessity for close cooperation between peace-builders and local parties.

The few examples of peace-building (e.g., Kosovo, Bosnia, East Timor) and quasi-peace-building missions (e.g., Cambodia<sup>141</sup> and Somalia<sup>142</sup>) point out several

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<sup>137</sup> One of the first resolutions authorizing peacekeeping in the Congo in 1960 did not identify any particular Article of the UN Charter as the basis for the peacekeeping deployment. Secretary-General Dag Hammarskjöld considered Article 40 to be the basis for such operations. See, *Letter of from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 15<sup>th</sup> Sess., 1920<sup>th</sup> mtg at 1, U.N. Doc. S/4381 (1960).

<sup>138</sup> Here, I mean through his initiative to develop a concept of peace-building in *An Agenda for Peace* and the Supplement to *An Agenda for Peace*.

<sup>139</sup> See, Chapter I.

<sup>140</sup> Even if they did, neither *An Agenda for Peace*, nor the Supplement nor the Brahimi Report have sufficient authority to be a source of power for the UN organs.

<sup>141</sup> The establishment of the UN Transitional Authority in Cambodia (UNTAC) was based on both state's consent and Security Council authorization. According to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, the Cambodian parties agreed on the principles for the settlement of the Cambodia conflict. In particular, the Agreement provided for the delegation of powers to the UNTAC, which could exercise civil and military functions in the country. These provisions of the Agreement were subsequently endorsed by Security Council Resolution 668 (1990). See, *Peace Agreements Digital Collection: Cambodia*, online: US Institute for Peace Homepage [http://www.usip.org/library/pa/index/pa\\_cambodia.html](http://www.usip.org/library/pa/index/pa_cambodia.html) (date accessed: 31 July, 2001).

<sup>142</sup> In contrast to Cambodia, the deployment of the United Nations Operations in Somalia II (UNOSOM II) was primarily based on Security Council authority under Chapter VII. Based on the presumption that there was no sovereign authority in Somalia, SCR 814 (1993) specified the extent of the UNOSOM nation-building mandate. For more information on the Somalia operations, see Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operation: The Search for a Legal Framework* (The Hague: Kluwer Law International, 1999); Sean D. Murphy, "The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War" (1994) 32 Colum. J. Transnat'l L. 201 at 231.



possible sources of authority for the establishment of international administrations: the authorization of the Security Council under Chapter VII or state's consent to intervention, or the combination of the two.<sup>143</sup>

State's consent and Security Council authorization are mutually complementary. A Security Council resolution creates a legal basis for a peace-building mission. A host state's consent to the establishment of a peace-building mission provides preconditions for potentially more legitimate and successful (due to the cooperation of the local authorities) peace-building. As evidenced from the practice of the above mentioned missions, a state's consent may be expressed through signing peace accords between the parties to an internal conflict,<sup>144</sup> or through acceptance of the principles for the settlement of a conflict proposed by an international community.<sup>145</sup>

*b. The UN authority to establish an international administration*

The power of the Security Council to authorize actions to restore and maintain international peace and security is derived from Article 39 of the UN Charter. According to it, the Security Council has the authority to "...determine the existence of any threat to the peace, breach of the peace, or act of aggression"<sup>146</sup> and decide on measures to be taken to restore and maintain peace and security. In the Lockerbie decision (provisional measures order of April 14, 1992) Judge Weeramantry stated that it is only for the Security Council to judge on the existence of the circumstances, which "bring Chapter VII into operation."<sup>147</sup> Moreover, there is nothing in the UN Charter that suggests that the

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<sup>143</sup> From the point of view of state sovereignty, both state's consent and enforcement action, are legitimate bases for the exception to the principle of state sovereignty and non-interference. According to Article 2(7) of the UN Charter, the UN is prohibited from intervening in essentially domestic affairs of states, except in application of enforcement measures under Chapter VII.

<sup>144</sup> Sonia Han, "Building a Peace that Lasts: The United Nations and Post-civil War Peace-Building" (1994) 26 NYU J. Int'l L. & P. 837 at 884.

<sup>145</sup> One can argue about the voluntary character of such consent. Often the host state has to agree to the proposed solution under the pressure from the international community. For example, the FRY was under political, economic and military pressure to give consent to the principles for the resolution of the Kosovo crisis. Moreover, the principles for the resolution of the Kosovo crisis were drafted by the by the G-8 foreign ministers without the participation of the FRY.

<sup>146</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7, art.39.

<sup>147</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from an Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Order of 14 April 1992,

decision of the Security Council can be reviewed by any other body, including the International Court of Justice.<sup>148</sup>

Being initially intended for international conflicts, the notion of threat to peace has been gradually extended to capture internal conflicts that are deemed to constitute threats to the peace. As the ICTY stated in the *Tadic* decision, "it can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts."<sup>149</sup>

In the last decades the Security Council has used its power under Chapter VII in relation to many essentially internal conflicts. The circumstances leading to the determination of the threat to peace have varied from an aggravating humanitarian catastrophe<sup>150</sup> to the continuing escalation of human rights violations and mass flow of refugees from a conflict zone.<sup>151</sup>

Having determined the existence of the threat to peace and security, the Security Council can authorize measures to restore and maintain peace in accordance with Articles 41 and 42. Article 41 defines measures "not involving the use of armed force."<sup>152</sup> Article 42 prescribes other actions involving the use of air, sea or land forces. Neither Article 41 nor Article 42 includes the establishment of an international administration as one of the suggested measures.

In the *Tadic* decision on the appeals of jurisdiction, the ICTY addressed the issue whether the Security Council is bound to employ only measures expressly provided in Articles 41 and 42. The Tribunal admitted that the Security Council has very broad powers under Chapter VII (Articles 41 and 42). "These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds,

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online: ICJ Homepage <<http://www.icj-cij.org/icjwww/idecisions/isummaries/ilusummary920414.htm>> (date accessed: 15 July 2001).

<sup>148</sup> As Judge Weeramantry put it: "it is not for the court to sit in review on a given resolution of the Security Council." See, *ibid*.

<sup>149</sup> *Prosecutor v Dusko Tadic*, Decision of 2 October 1995, para. 29, online: ICTY Homepage <http://www.un.org/icty/ind-e.htm> [hereinafter *Tadic*].

<sup>150</sup> Security Council Resolution 794, S/RES/794 (1992), online: United Nations Homepage <http://www.un.org/documents/sc/res/1992/s92r794e.pdf> (date accessed: 5 June 2001).

<sup>151</sup> Security Council Resolution 940, S/RES/940 (1994) online: United Nations Homepage <http://www.un.org/Docs/scres/1994/9431222e.htm> (date accessed: 5 June 2001).

<sup>152</sup> *Charter of the United Nations*, *supra* note 146, art. 41.

for even wider and more general powers than those already expressly provided for in the Charter.”<sup>153</sup> The ICTY stated that the measures listed in Article 41 are only illustrative examples “which obviously do not exclude other measures.”<sup>154</sup> Under this interpretation, the establishment of an interim administration will also be within the powers of the Security Council under Chapter VII. In fact, the establishment of an international administration is not the sole example of the Security Council utilizing the measures not expressly provided in Article 41 or 42. Earlier, the Security Council authorized the creation of international judicial bodies<sup>155</sup> (the ICTY and the ICTR) and the creation of a special fund to compensate the victims of the Gulf War.<sup>156</sup>

*c. Peace-building and enforcement action*

Let us now look at how peace-building may be classified on the scale of the contemporary peace operations. The distinction between the operations can be drawn according to two criteria: legal basis for an operation and actual characteristics of an operation. If Security Council authorization were the sole basis for the establishment of a peace-building mission, peace-building would, actually, constitute peace enforcement. However, we have already seen that at least formally peace-building is partially based on state’s consent. It is interesting why the international community would seek such consent if the Security Council can authorize the establishment of an international administration under Chapter VII. I think that the reasons for seeking host state’s consent are twofold: first, because peace-building interventions are problematic from the point of view of legitimacy (the international community seeks to mitigate this problem by obtaining formal state consent); second, because through state consent the international community can ensure the cooperation of the local authorities with peace-builders. Another question is whether the host state’s consent can actually be regarded as consent. In many respects it will be imposed under economic, political or even military pressure.

<sup>153</sup> *Tadic*, *supra* note 149, para. 31

<sup>154</sup> *Ibid.*, para. 32.

<sup>155</sup> Security Council Resolution 827, S/RES/827(1993), online: United Nations Homepage <http://www.un.org/Docs/scres/1993/827e.pdf> (date accessed: 4 June 2001). The Resolution authorized the creation of the International Tribunal for the Former Yugoslavia.

<sup>156</sup> Security Council Resolution 687, S/RES/687 (1991), online: United Nations Homepage <http://www.un.org/Docs/scres/1991/687e.pdf> (date accessed: 4 June 2001).

For example the FRY was exposed to all these kinds of pressure when it agreed to the withdrawal and to the international deployment in Kosovo. Moreover, the host state may have little say in elaborating the solution to which it consents. Again, in case of the FRY, the principles of the political settlement for Kosovo were prepared by the G-8.<sup>157</sup> Thus, from a formal point of view peace-building is not an enforcement operation because it is partially based on state consent, but because of doubtful nature of such “consent” peace-building, actually, may be equated to peace enforcement.

Let us look at other characteristics of peace-building and its place among peace operations. The four types of peace operations (peace-making, peacekeeping, peace enforcement and peace-building<sup>158</sup>) can be differentiated by two characteristics: when they take place in time and how intrusive they are on the state sovereignty. Viewed over the duration of a conflict, peacemaking and peace-building are located at far ends of a conflict. Peacemaking usually takes place before the development of open tension. Post-conflict peace-building is exercised after the establishment of the initial peace between the warring parties. In contrast, peacekeeping and peace enforcement take place during or shortly after the end of open hostilities.

Measured by their degree of intrusiveness over state sovereignty, peacemaking and peacekeeping are less coercive. Peacemaking “is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations.”<sup>159</sup> Peacekeeping involves the deployment of the UN force in a conflict zone. It is based on three core principles: consent of parties, impartiality, and non-use of force except in self-defense.<sup>160</sup> In contrast, peace enforcement, intended to redress threat to international peace and security or acts of aggression, involves coercive military action, to which state consent is not necessary.

Because peace-building missions were often established partially on the basis of state consent, peace-building seems to be close to peacekeeping. The UN documents also emphasize the close connection between peacekeeping and peace-building. At the same time, the other two essential features of peacekeeping – use of force only in self-defense

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<sup>157</sup> See, Section A of this Chapter.

<sup>158</sup> *An Agenda for Peace*, *supra* note 1.

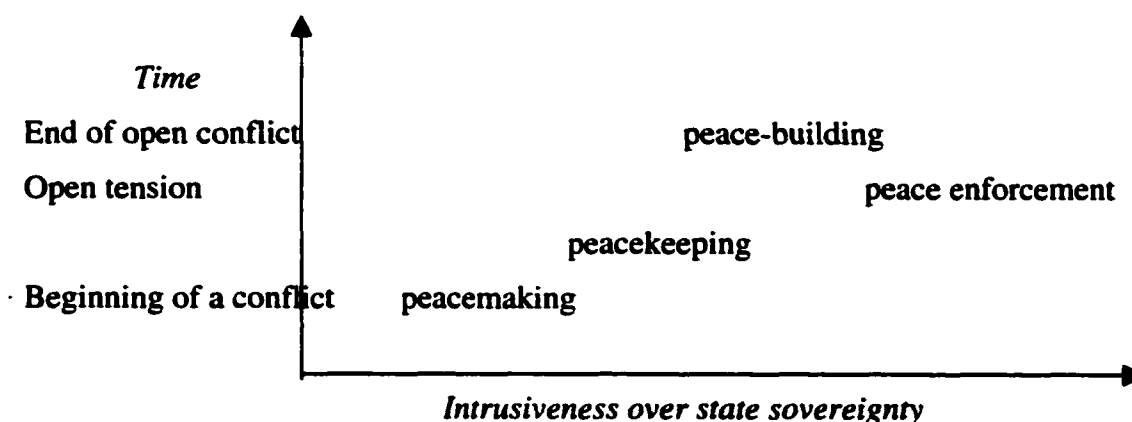
<sup>159</sup> *Ibid.*, para. 20.

<sup>160</sup> *Supplement to An Agenda for Peace*, *supra* note 5, para. 33.

and impartiality – are not characteristic of peace-building. First, peace-building mandates comprise broad military and police powers, which allow the use of force beyond self-defense. For example, the international security presence in Kosovo includes a military contingent with broad powers “to take such actions as are required, including the use of necessary force, to ensure compliance with this Agreement and protection of the international security force (“KFOR”).”<sup>161</sup>

Second, peace-builders are not neutral or impartial. They become parties to the reconstruction process and pursue post-conflict rehabilitation from the perspective of their own values and outlook.<sup>162</sup> Peace-building is more coercive than peacekeeping also because it includes the temporary transfer of authority from a state to an international administration, that is, a significant infringement upon state sovereignty. Thus, judged by its legal basis and other characteristics, peace-building comprises elements of both peacekeeping and peace enforcement.

Graphically, the place of peace-building among other peace operations can be presented in the following way. (See, illustration below)



**Picture 1. Peace-building on the scale of peace operations.**

<sup>161</sup> *Military Technical Agreement*, the International Security Presence (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 9 June 1999, online: KFOR Homepage <http://www.kforonline.com/resources/documents/mta.htm> (date accessed: 29 April, 2001).

<sup>162</sup> This issues falls within the range of moral controversies of peace-building which will be discussed in Section B.

*d. Participation of international organizations in UN authorized peace-building*

As seen from the description of the UNMIK, the UN does not exercise peace-building alone, but engages other international organizations in reconstruction. We have now defined the sources of the UN authority to establish international administrations. What is the basis for the participation of other international organizations in peace-building?

The basis for the participation of international organizations in peace-building should be sought in the UN Charter and the constitutive documents of respective organizations. The Security Council is likely to use regional arrangements for peace-building under Article 52 of the UN Charter. In other situations the ability of international organizations to participate in peace-building will be primarily defined according to whether their constitutive documents provide for such participation. Let us briefly review the participation of the OSCE, the EU and NATO<sup>163</sup> in peace-building in Kosovo.

*i. The OSCE*

The 1992 Helsinki Summit Document declared the OSCE (the CSCE at that time) a regional arrangement under Chapter VIII.<sup>164</sup> It also defined the main principles of the OSCE participation in peacekeeping.<sup>165</sup> In particular, the Helsinki Document expressly restricted the OSCE participation in enforcement actions.<sup>166</sup>

Peace-building occupies an intermediate position between peace enforcement and peacekeeping. Because peace-building is more coercive than peacekeeping, it is necessary to consider whether there are any limitations on the OSCE participation in such operations. As applied to the Kosovo situation, the concrete responsibilities of the OSCE as a part of the UNMIK include: organization of elections, promotion of human rights,

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<sup>163</sup> According to SCR 1244, NATO leads the international security presence in Kosovo (KFOR), which is not a part of UNMIK.

<sup>164</sup> CSCE Helsinki Document "The Challenges of Change"(1992), para. 25, online: OSCE Homepage <http://www.osce.org/docs/english/1990-1999/summits/hels92e.htm> (date accessed: 5 May 2001).

<sup>165</sup> Note that none of the OSCE Summit documents expressly refers to peace-building.

<sup>166</sup> CSCE Helsinki Document "The Challenges of Change", *supra* note 164, ch. III.

development of independent media, democratization, etc.<sup>167</sup> They do not go beyond the main goals of the organization and permissible activities spelled out in the OSCE basic documents, that is, conflict management and prevention, human rights, economic cooperation and social justice.<sup>168</sup> Consequently, the coercive nature of peace-building itself does not prevent the OSCE participation in the UNMIK so far as the concrete activities of the OSCE are consistent with the organization's goals and principles.

## ii. *The EU and NATO*

Unlike the OSCE, neither NATO nor the EU views conflict prevention and post-conflict rehabilitation as its primary objective.<sup>169</sup> Neither they are regional arrangements within the meaning of Chapter VIII.

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<sup>167</sup> See, section A of this Chapter.

<sup>168</sup> The 1992 Helsinki Summit Declaration reads: "...[W]e emphasize the central role of the CSCE in fostering and managing change in our region. In this era of transition, the CSCE is crucial to our efforts to forestall aggression and violence by addressing the root causes of problems and to prevent, manage and settle conflicts." 1992 Helsinki Summit Declaration Document, para. 19, online: OSCE Homepage < <http://www.osce.org/docs/english/1990-1999/summits/hels92e.htm> > (date accessed: 5 May 2001). Further the 1994 CSCE Budapest Document affirms that "[t]he CSCE will be a primary instrument for early warning, conflict prevention and crisis management in the region. We have agreed that the participating States may in exceptional circumstances jointly decide that a dispute will be referred to the United Nations Security Council on behalf of the CSCE." 1996 Lisbon Summit: "Our approach is one of co-operative security based on democracy, respect for human rights, fundamental freedoms and the rule of law, market economy and social justice."

<sup>169</sup> The preamble the NATO Treaty reads: "The Parties to this Treaty ... seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the preservation of peace and security." *North Atlantic Treaty*, 4 April 1949, online: NATO Homepage < <http://www.nato.int/docu/basic/txt/treaty.htm> > (date accessed: 22 May 2001)

Article 2 of the Treaty on European Union defines the following objectives:

- to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
- to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17;
- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;

For example, NATO has been established as an alliance oriented towards defense from an external threat.<sup>170</sup> Originally, it was not considered a regional arrangement under Chapter VIII. However, during the last decade NATO was frequently utilized in the UN-led restoration and maintenance of international peace and security.

In Resolution 1244, the Security Council welcomed the participation of both the EU and NATO in peace-building in Kosovo. It is, however, unclear whether this reference confers on them the status of regional arrangements and provides sufficient authority on the participation of those organizations in peace-building.

Some guidelines about the participation of international and regional organizations in peace operations, including peace-building, can be found in *An Agenda for Peace* and the Supplement to *An Agenda for Peace*. *An Agenda for Peace* suggests that regional arrangements should be utilized in peace-building. It also mentions that the Charter of the United Nations deliberately does not give a precise definition of regional arrangements, thus allowing more flexibility for the utilization of such arrangements. Regional arrangements can include a variety of organizations, even those that were initially formed for mutual security and defence, as well as organizations for general regional development or for cooperation in particular economic, political or social area.<sup>171</sup> Under this definition, the EU and NATO apparently are not precluded from participation in peace-building.

## 2. Moral problems of peace-building

Since peace-building is based on Security Council authorization under Chapter VII or a state's consent or both, the establishment of an international administration is a legitimate exception to the sovereignty principle. However, the formal legality of international interference does not resolve some "moral" concerns about peace-building

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-to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. *Treaty on European Union*, 7 February 1992, online: < <http://europa.eu.int/en/record/mt/top.html> > (date accessed: 22 May 2001).

<sup>170</sup> Article 5 of the NATO Treaty reads: "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations..." *North Atlantic Treaty*, *supra* note 169.

<sup>171</sup> *Agenda for Peace*, *supra* note 1, para. 61.



activities. Among the “moral” concerns are the fear of the neo-colonialist nature of peace-building, monopolization of the local administration by “outsiders,” imposition of a “Western” style democracy and economy over post-conflict societies. Thus, the question arises not that much about the legitimacy of a peace-building intervention itself, but about its scope and the means by which such intervention is exercised. Let us look at these “moral” problems in more detail.

*a. Peace-building: echoes of neo-colonialism?*

As one can observe from the instances of Kosovo, Somalia or Bosnia, peace-building takes place in zones where state institutions have totally or partially collapsed and, thus, no effective authority exists to maintain order, stop human rights abuses, provide basic public services, etc.(e.g., Somalia, Kosovo) The extreme circumstances of such a zone give rise to negative perceptions about post-conflict societies: 1) Such post-conflict states (also called “failed” states, i.e., states which are not able to govern themselves because their institutions have collapsed) are often viewed as requiring serious guidance from the international community. This approach implies some inequality of treatment, a perception that “failed” states are inferior, incapable, uncivilized. These are attitudes characteristic of the colonial era. 2) The perception about post-conflict societies as “uncivilized” may lead to the application of lower standards of protection to such societies compared to those normally applied in “developed” countries. For example, peace-builders may feel that an “uncivilized” environment justifies application of “uncivilized” means, like use of force in violation of human rights standards, discrimination, etc.<sup>172</sup> One of the vivid examples of such “uncivilized” behaviour are the actions of peacekeepers in Somalia. According to the reports by human

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<sup>172</sup> For the example of such “uncivilized” ways of behaviour of peacekeepers, see the following materials on the actions of peacekeepers in Somalia: *Peacekeepers Tortured Somali Suspects, Electronic Mail & Guardian* <http://www.mg.co.za/mg/news/97june1/11june-somali.html>; Global Rules Now Apply to Peacekeepers, U.N. Chief Declares, August 12, 1999, NY Times [http://www.nytimes.com/learning/students/ask\\_reporters/articles/crossette-article2.html](http://www.nytimes.com/learning/students/ask_reporters/articles/crossette-article2.html); Women Tell UN Security Council of Abuses During War, October 23, 2000, online: United Nations Development Fund for Women (UNIFEM) Homepage < [http://www.unifem.undp.org/pr\\_unseccoun.html](http://www.unifem.undp.org/pr_unseccoun.html) > (date accessed: 15 August 2001). These materials primarily refer to the cases of human rights abuses committed by peacekeepers in Somalia. These are the most “famous” cases, but such happenings give rise to suspicion that similar violations might have occurred in other missions, including Kosovo.

rights organizations, their actions included rape and torture of the members of local communities. I am inclined to think that every mission potentially can suffer from such problems and that every mission may have instances of such behaviour.

Another moral problem is the scope of the authority of international missions. For example, the Report by the UN Secretary General concerning the implementation of SCR 1244 reads: "The Security Council ... has vested in the interim civil administration authority over the territory and people of Kosovo."<sup>173</sup> Concentrating all the authority in its hand, an international administration is in position to dictate the approach to democratization in a war-torn society. If local parties are perceived as lacking knowledge and development and, thus, not being worth consulting, an international administration can effectively preclude local communities from choosing the way of reconstruction of their own country. If the UN imposes the solutions to a post-conflict society (even, if it is considered to be for the good of that society) it is likely to violate its own democratic principles. The spirit of the UN Charter ("We the People of the United Nations..."<sup>174</sup>) implies that the population should be included in the government, that their voice should be heard.

These are the general thoughts about the moral side of peace-building. To assess whether peace-building brings a real threat of neo-colonialism, we have to look at the aims and means of peace-building – the motives for international involvement in post-conflict reconstruction and the kind of values that are "imposed" in post-conflict societies.

#### *i. Motives for peace-building*

Notwithstanding the extremely high costs of peacekeeping and peace-building, international organizations continue to engage in these operations and even expand their scope. Because states are rational actors,<sup>175</sup> there must be compelling reasons for their involvement. Although humanitarian concerns for the population of a conflict zone are a noble goal, they usually would not be the primary motive for the international

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<sup>173</sup> *Report of the Secretary-General of 12 July 1999, supra* note para 107. Emphasis added. SCR 1244 itself does refer to the authority of the UNMIK over the people of Kosovo.

<sup>174</sup> *Charter of the United Nations, supra* note 146, preamble.

<sup>175</sup> Anthony Clark Arend, "Do Legal Rules Matter?" (1998) 38 Va. J. Int'l L. 107 at 119.

involvement (although from a formal point of view, an international intervention should be and formally is primarily motivated exclusively by humanitarian concerns<sup>176</sup>).

International aid is selective. The willingness of states to interfere and the scope of the international engagement depend on the vital interests of intervening states. Where such interests are at stake, states will intervene more actively. For example, the situations in Chechnya and Eritrea were no less serious than in Kosovo or Iraq, but the international community was much more attentive to the latter than the former two.<sup>177</sup>

States seek to maximize their interests.<sup>178</sup> Peace-building is not merely assistance in post-conflict reconstruction carried by the international community for humanitarian considerations. It is a way to pursue states' political objectives. In post-conflict peace-building states pursue at least two objectives. First, they mitigate the threat that the conflict poses to stability and well-being in the region. Second, they expand the areas of their influence over a reviving state. In the short term, peace-building activities allow for the return of refugees and reduce trans-border crime, thus lightening the economic and security burden on regional states. In a long run, states-peace-builders participate in shaping a new order in the region.<sup>179</sup>

It follows from the above that the intervening states have not only a common interest of protecting peace and human rights, but also a self-interest, which significantly influences their willingness to move forward with an intervention. On the one hand, self-interest is essential for peace-building because it stimulates states' political support without which the UN is not be able to carry out complex peace operations. On the other hand, the desire of stronger states to fulfill their own foreign policy objectives through peace-building gives rise to doubts about the "good will" of these interveners. Thus, the motives for peace-building are likely to support the proposition that peace-building is an enterprise for pursuing states' foreign policy objective, rather than solely the well-being of post-conflict states.

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<sup>176</sup> The problem lies in contradiction between the requirements of Realpolitik and the necessity to comply with the principles of international law. Their correlation will to great extent define the moral environment of peace-building.

<sup>177</sup> In my opinion, the selective nature of the international attention may be explained exactly by the degree of interests in a particular conflict by the international community.

<sup>178</sup> Arend, *supra* note 175 at 119.

<sup>179</sup> Wedgwood & Jacobson, *supra* note 133 at 3.

*ii. Imposing democracy is undemocratic?*

Peace-building is in many respects about building democracy. The elements of democracy – government by the people, equality, human rights – have gained acceptance as universal values.<sup>180</sup> Some scholars even talk about an emerging international norm for “democratic entitlement,”<sup>181</sup> which allows an international intervention to prevent human rights abuses and protect democracy. It may be said that because everybody is entitled to democracy, the implementation of democracy by international administrations in post-conflict societies is merely a realization of that universal right. Even so, there are several problematic issues about the implementation of democracy in post-conflict societies: how the peace-builder himself defines “democracy”; how democracy is implemented (imposed or built through the consultation with the local population); and what are the motives behind the imposition of democracy. (the latter issue was discussed above)

The current peace-building strategies, including democratization, are mainly developed if not dictated by Western countries. Scholarly analysis of peace operations is carried out mainly by Western scholars. The donor organizations taking part in physical reconstruction of post-conflict states are usually Western. Consequently, the methods of peace-building reflect a Western outlook. The domination of “Western” outlook in peace-building strategies entails both practical and theoretical complications for peace-building. Theoretically, peace-building may be criticized as imposing Western values. Understanding this potential concern, Boutros-Ghali emphasized that the UN cannot impose a new political structure or new institutions on post-conflict states. The organization “can only help the hostile factions to help themselves and begin to live together again.”<sup>182</sup> However, the practice of Kosovo shows that the activities of international administration go far beyond mere helping the warring parties to live together again. The imposition of solutions is to certain extent unavoidable because all the power of decision-making and enforcement is concentrated in the hands of an international administration. In this respect, the practice of the UNMIK is very interesting. It managed to reconcile the two challenges of having power

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<sup>180</sup> See, e.g., Barnes, *supra* note 28.

<sup>181</sup> John C. Pierce, “The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance” (1996) 27 Law & Pol’y Int’l Bus. 477 at 483.

<sup>182</sup> *Supplement to Agenda for Peace*, *supra* note 5, para. 13-14.

and not imposing solutions unilaterally. This mechanism established by the UNMIK will be discussed in Chapter III.

The practical aspect of “Western type” democracy-building relates to the question to what extent particular “Western” democratic principles are suitable and workable in post-conflict societies. In post-conflict societies there is little ground for quick construction of “Western type” democracy either in terms of institutional structure and economic foundation or legal and political culture. The development of a political system and civil society requires not only the existence of formal democratic institutions like universal suffrage, political parties, elected representative bodies, but also a certain political culture, which is consistent with that political system.<sup>183</sup> The “Western” model of democracy is based on a participant political culture. As Almond and Verba point out, in participant political culture members of the society tend to be oriented towards the political system as a whole, to both its political and administrative structures. The members of the society are oriented to play an “activist” role in the self of the polity.<sup>184</sup> In a post-conflict, post-Soviet society like Kosovo people are unlikely to be very actively oriented towards the political system and participation in it. The lack of such culture makes democratization more difficult. If peace-builders concentrate on “Western” structure as an exclusive pattern for institutional reconstruction, this may limit their creativeness and flexibility in seeking solutions for post-conflict societies and ultimately reduce the success of peace-building.

### **Interim conclusion**

The moral factor influences the exercise of peace-building in several aspects. First, it facilitates the possibility of institutional and other changes in a post-conflict society – if the involvement of peace-builders in reconstruction and the methods that they are using are viewed by the local population as legitimate, the locals are more likely to assist the international forces in reconstruction. Second, legitimacy influences the sustainability of the changes introduced by peace-builders – if the new institutions and

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<sup>183</sup> Gabriel Almond & Sidney Verba, *Civic Culture* (Boston and Toronto: Little, Brown and Company, 1965) at 3.

<sup>184</sup> Almond & Verba, *supra* note 183 at 3.

procedures developed by peace-builders are not viewed by locals as legitimate, they are not likely to be sustained after the withdrawal of the international forces.

In cases of international administrations in post-conflict zones, democracy is built not from within, but from the outside, through formative coercive intervention of the international community. The unifying force of the international administration is an important positive incentive, which promotes cooperation among local elites. However, because democracy-building starts from the outside and it is not a result of an internal impulse, this process may be more difficult to sustain after the withdrawal of the international mission. Political and constitutional evolution in a collapsed state is impossible unless it is accepted by the local public as reflecting their history and aspirations, rather than treated as an alien solution imposed by the international community. Because legitimacy of international activities becomes important, international administrations have to identify ways of involving the local population in cooperative decision-making.

### **C. Conclusion to the Chapter**

This Chapter completed the analysis of the characteristics of peace-building. In addition to the previously defined criteria,<sup>185</sup> it has clarified some legal issues of peace-building. First, peace-building should be based on host state's consent, which is further reaffirmed by the Security Council. In regard to the exercise of a peace-building mission, the Security Council Resolution serves the source of the mission's mandate and of the obligations for other member states and international organizations to participate in reconstruction. Second, there is no restriction on the participation of international organizations in peace-building. According to *An Agenda for Peace*, international organizations can participate in peace-building regardless of the initial purpose of their foundation and basic objectives.

Thus, we can summarize the following criteria for peace-building: 1) it is comprehensive in nature; 2) it includes institution-building as one of the major objectives; 3) it seeks transformation of a society and promotion of its sustainability; 4) it is partially based on host state's consent; 5) it is closely connected with peacekeeping; 6)

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<sup>185</sup> See, Chapter I, section A(1).

it involves close cooperation between peace-builders and local parties; and 7) participation of international organizations in peace-building is not restricted to regional arrangements within the meaning of Chapter VIII. In addition to these features, peace-building activities have to be generally consistent with UN principles and international human rights standards.

I would like to revisit the issue of the close connection between peace-building and peacekeeping. The idea of their required connection does not seem very urgent to me. First, peacekeepers who can use force only in self-defense and who are, by definition, neutral and impartial probably would not be very successful in the intended role of preparing ground for peace-builders. It would be very strange to have lightly armed peacekeepers deployed first (shortly after the cessation of hostilities, when the situation might still require more radical means) and then transfer the authority to peace-builders who have greater military and police powers. The idea of requiring a connection between peacekeeping and peace-building seems to be an atavism of the previous international infatuation with peacekeeping. In my opinion, a close connection between peacekeeping and peace-building should not be seen as a mandatory characteristic of peace-building.

In the case of Kosovo, the idea of a connection between peacekeeping preparing the ground for peace-building acquired a new form. In a certain sense the KFOR played the role of "ground preparator." This was exercised in several ways: the KFOR played the primary role in the initial restoration of order in the Province; the KFOR provided security for the international personnel in Kosovo; the KFOR exercised policing until the UNMIK Police could assume responsibility for this task.

The discussion of this Chapter started with an implicit assumption that the UNMIK is a peace-building mission. Interestingly, a more detailed analysis of the theoretical characteristics of peace-building and the actual situation in Kosovo demonstrates that generally the establishment of the UNMIK was consistent with these requirements, but some of them were not strictly followed. (For example, the role given to the Secretary-General in the interpretation of SCR 1244.) These inconsistencies do not make the UNMIK any less peace-building in its nature and intent, but highlight the areas of peace-building to which more attention should be paid. Some of the legal inconsistencies in the establishment of the UNMIK may impact on the moral side of

peace-building. The more legal inconsistencies there are, the more intensive will be the concerns about the neo-colonialist nature of peace-building. The next chapter demonstrates how the UNMIK tried to mitigate the legitimacy problem through establishing consultative Kosovar organs and implementing the principles of consociationalism.



## **Chapter III**

### **Development of Self-government in Kosovo**

The organization of elections and electoral monitoring are no longer a completely new task for international missions. The activities of several peacekeeping missions, which exercised electoral monitoring in post-conflict Angola,<sup>186</sup> Cambodia,<sup>187</sup> Bosnia and Herzegovina,<sup>188</sup> allowed the UN to generate a certain expertise in this area. However, the needs of the Kosovo reconstruction are of a qualitatively new level – development of self-government.

In this Chapter I argue that for the completion of this task to be successful, the UNMIK has to closely follow the recommendations of consociationalism about meaningful participation of minorities in provincial and municipal organs and observe the restraints put on its authority through the peace-building concept.

#### **A. Kosovo ethno-political landscape**

Before describing the UNMIK approach to the development of self-government, it is necessary to characterize the situation in the Province, which served as a context for the adoption of the UNMIK strategy.

Two characteristics of the Kosovo society that have a direct impact on electoral process and functioning of representative bodies are the ethnic breakdown of the population and the division of political organizations along ethnic lines.

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<sup>186</sup> According to Security Council Resolution 747, the United Nations Angola Verification Mission II (UNAVEM II) was given a mandate to observe and verify of the presidential and legislative elections. See, Security Council Resolution 747, online: United Nations Homepage < <http://www.un.org/documents/sc/res/1992/s92r747e.pdf> > (date accessed: September 20, 2001).

<sup>187</sup> According to the Agreement on the Comprehensive Political Settlement of the Cambodia Conflict, the mandate of the UN Transitional Authority in Cambodia (UNTAC) included the organization and conduct of elections. See, to the Agreement on the Comprehensive Political Settlement of the Cambodia Conflict, *supra* note 141.

<sup>188</sup> Among the tasks of the UN Mission in Bosnia and Herzegovina (UNMIBH) was organization and monitoring of elections.

### 1. *Ethnic breakdown of the Kosovo population*

For many years Kosovo has been a home for a variety of ethnic communities.<sup>189</sup> The Province was traditionally inhabited by Albanians, who constitute the majority, as well as Serbs, Turks, Bosniacs, Egyptians, Ashkali and other ethnicities.<sup>190</sup>

During the years of the conflict the structure of the Kosovo population had undergone significant changes largely due to an intensive flow of refugees from the conflict zone.<sup>191</sup> Although after the conflict the minority population decreased comparing to the 1991 census,<sup>192</sup> Kosovo still remains a multiethnic Province. (See, Table 2)

According to the results of the 2000 civil registration,<sup>193</sup> the Kosovo population is estimated at 1 886 589 people.<sup>194</sup> The Joint Registration Taskforce did not collect information on ethnic affiliation of the applicants, but the OSCE and the KFOR produced independent estimates of the numbers of ethnic communities in Kosovo.<sup>195</sup> While these are only estimates, the figures offer a fairly precise picture about the population distribution by ethnicity and the weight of each ethnic group in the total Kosovo population. The following table demonstrates the quantitative correlation of ethnic communities in each of the 30 Kosovo municipalities.

<sup>189</sup> Vickers, *supra* note 78 at 103, 116-120, 170-171.

<sup>190</sup> *Ibid.*, at 116. See, also the discussion in Chapter I, section A.

<sup>191</sup> See, Chapter I, Section A.

<sup>192</sup> In 1991 82.2% of the Kosovo population was Albanian, 9.9% - Serb, 2.9% - Bosniacs, 2.2% - Roma, 0.5% - Turks and 0.4% - Croat. See, Judah, *supra* note ?? at 313.

<sup>193</sup> There was no reliable data about the Kosovo population after the conflict. Thus, civil registration was one of the first tasks of the international administration. The registration was carried out under the authority of the OSCE and the United Nations Civil Administration. The pillars agreed to unite their resources for the civil registration project. The registration was carried out by a special organ - the Joint Registration Taskforce (JRT). The registration ran from March through August 2000 and embraced applicants both inside and outside Kosovo. The aim of the registration was to create a civil registry, which will allow people to be recognized as residents of Kosovo and to benefit from the services provided by the Administration. The registry has also served a basis of the voter lists for the municipal elections. See, Civil and voter registration starts throughout Kosovo, OSCE Press Release, 28 April 2000, online: OSCE Homepage < [http://www.osce.org/press\\_rel/2000/04/116-mik.html](http://www.osce.org/press_rel/2000/04/116-mik.html) >; Process begins for Kosovo civil and voter registration, OSCE Press Release, 14 April 2000 < [http://www.osce.org/press\\_rel/2000/04/138-mik.html](http://www.osce.org/press_rel/2000/04/138-mik.html) >; Press briefing on civil and voter registration in Kosovo, OSCE Press Release, 10 April 2000, < [http://www.osce.org/press\\_rel/2000/04/149-mik.html](http://www.osce.org/press_rel/2000/04/149-mik.html) > (date accessed: 7 July 2001).

<sup>194</sup> KFOR estimates, March 2001.

<sup>195</sup> The current situation does not allow for precise figures because of the constant move of the population: large numbers of refugees continue returning from abroad, internally displaced persons migrate within the Province.

**Table 2. Minority Population per Municipality**

<i>Municipality</i>	<b>Albanians</b>		<b>Serbs</b>		<b>Roma</b>		<b>Ashkali</b>		<b>Bosniacs</b>		<b>Turks</b>	
		%		%		%		%		%		%
<i>Gllgovc/Glogovac</i>	48,671	100	0	0	0	0						
<i>Malishevë/Mališevo</i>	51,372	100	0	0	6	0						
<i>Skenderaj/Srbica</i>	55,887	99	302	0.5	0	0	120	0.2				
<i>Kaçanik/Kaçanik</i>	43,215	99	0	0	231	0.5						
<i>Podujevë/Podujevo</i>	90,246	98	471	0.5	0	0	1000	1				
<i>Suharekë/Suva Reka</i>	69,662	98	799	1	799	1						
<i>Shtime/Štimlje</i>	25,709	97	31	0	618	2	400	1				
<i>Ferizaj/Uroševac</i>	120,947	96	24	0	1,005	1	4200	3.4				
<i>Deçan/Dečani</i>	30,287	96	30	0	640	2						
<i>Rahovec/Orahovac</i>	51,084	96	1,733	3	608	1						
<i>Prishtinë/Priština</i>	270,175	95	11,966	4	988	0.3			1000	0.3	100	
<i>Klinë/Klina</i>	25,244	94	12	0	1,237	5						
<i>Vushtrri/Vučitrn</i>	75,043	92	3,571	5	290	0.4	130	0.9			300	2.5
<i>Viti/Vitina</i>	54,616	93	3,943	7	43	0						
<i>Pejë/Peć</i>	109,743	92	1,263	1	2,154	2			6000	5		
<i>Mitrovice/Mitrovica</i>	100,121	90	9,057	7	150	0.1	170	0.1	3000	2.6	600	0.4
<i>Gjilan/Gnjilane</i>	89,369	85	13,479	12	400	0.4					2000	2
<i>Istog/Istok</i>	21,148	83	207	0.8	2,125	8			1000	4		
<i>Lipjan/Lipljan</i>	58,204	82	10,967	15	1,501	2	1500	2				
<i>Prizren/Prizren</i>	168,047	82	198	0.1	5,424	3			20000	9.3	12000	5
<i>Fushë Kosovë/Kosovo</i>												
<i>Polje</i>	20,922	77	4,819	2	1,500	6	2500	5				
<i>Gjakovë/Đakovica</i>	18,137	70	18	0	7,695	30						

<i>Kamenicë/Kamenica</i>	51,440	69	22,286	30	925	1						
<i>Obiliq/Obilić</i>	11,172	67	2,928	17	2,240	14	800	3				
<i>Novobërdë/Novo Brdo</i>	2,395	54	2,070	46	0	0						
<i>Štrpce/Shtërpçë</i>	3,535	29	8,523	70	0	0						
<i>Zubin Potok/Zubin Potok</i>	2,924	16	15,795	84	0	0						
<i>Dragash/Dragaš</i>	1,289	10	0	0	0	0						
<i>Zvečan/Zveçan</i>	516	5	9,444	95	0	0						
<i>Leposavić/Leposaviq</i>	80	0	16,302	98	200	1	190	1				
							1181					
<b>TOTAL</b>	<b>1,671,200</b>	<b>87.5</b>	<b>140,238</b>	<b>7</b>	<b>30,779</b>	<b>1.6</b>	<b>0</b>	<b>0.6</b>	<b>40000</b>	<b>2</b>	<b>150000</b>	<b>0.8</b>

Source: KFOR estimates and the UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo.

As seen from Table 2, people of the same ethnicity tend to settle compactly.<sup>196</sup> 16 out of 30 municipalities have populations which are more than 90% Albanian. The three northern municipalities - Zvecan, Zubin Potok and Leposavic - are predominantly Serb (more than 84% of the population). Significant numbers of Serbs also live in the central and eastern Kosovo (Štrpce, Novo Brdo, Kamenica) (See map of Kosovo below). Other minorities constitute a significant part of the population only in one or two municipalities. For instance, in Prizren almost 10% of the population are Bosniac. In Dakovica 30% of the population are Roma. Some municipalities hardly have any minority families (e.g., Malishevo, Glogovac, Kacanik).

The trend of territorial concentration of ethnic communities is observed even in relatively multiethnic municipalities (Prizren, Gnjilane, Mitrovica, Pristina, Vicitrn). For example, in Pristina small Roma communities live mainly alongside Kosovo Serbs in

<sup>196</sup> This is not to say that there are no minority members dispersed in areas inhabited by other ethnicities. For example, considerable part of Roma and Egyptians are dispersed in a number of rural areas in Klina and Istok. See, *Assessment of the Situation of Ethnic Minorities in Kosovo*, *supra* note 17 at 50.

enclaves in Gračanica/Ulpiana, Caglavica/Cagllavice, Preoce/Peroc and Laplje Sello/Fshati Llap.<sup>197</sup> The Askaelia community in Mitrovica is concentrated mainly south of the river Ibar.<sup>198</sup>

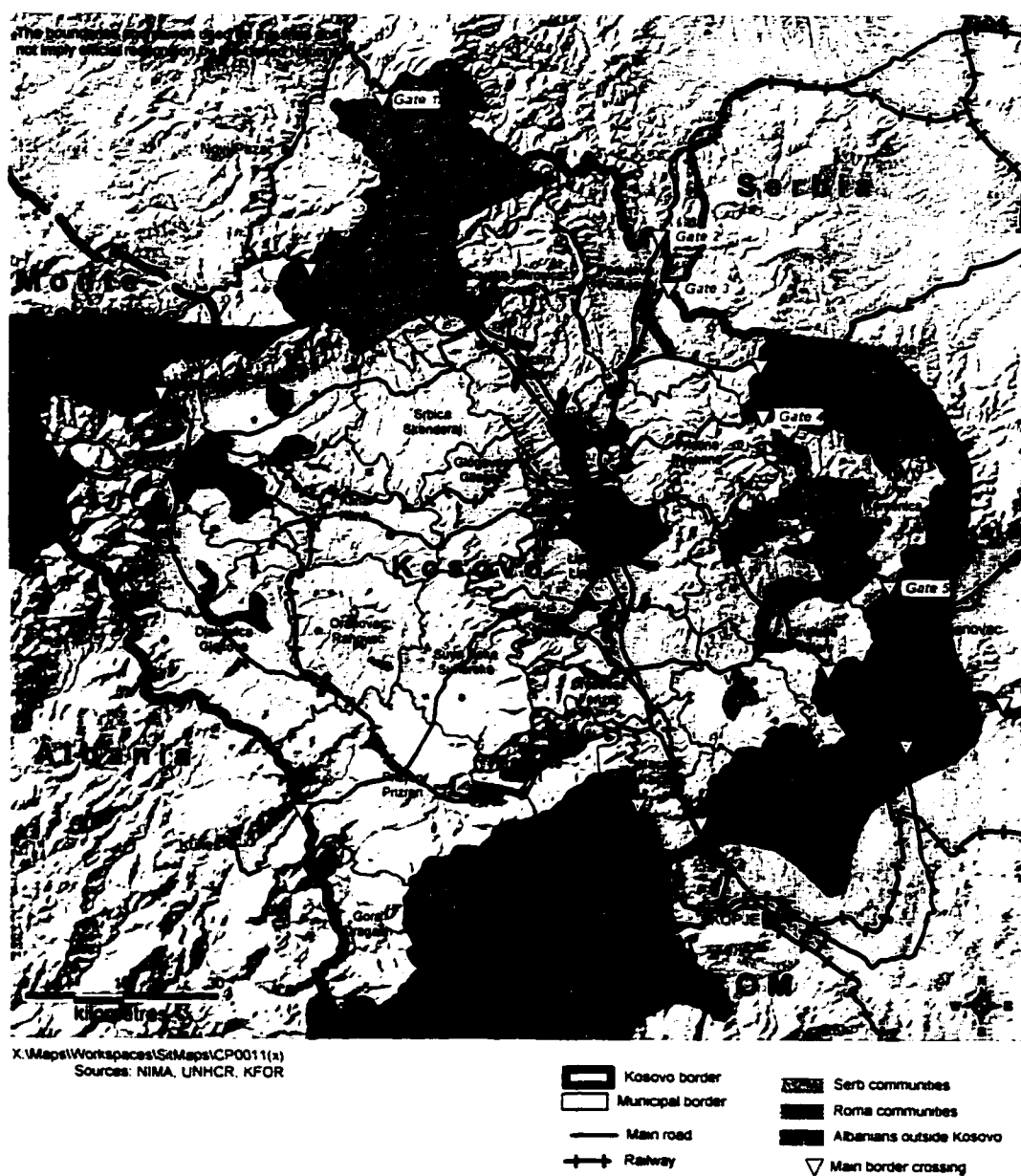
I draw special attention to the ethnic composition of the population and its distribution among the municipalities because, in my opinion, these two are the key to better understanding the electoral results and electoral regulation.<sup>199</sup> Because the behaviour of the electorate in a divided society is ethnically motivated, the data about ethnic distribution allows us to roughly predict what parties will dominate the representative organs of a particular municipality. For example, judging only from the picture of the territorial distribution of the Kosovo population, we can expect the victory of Albanian parties in the majority of Kosovo municipalities and a good chance for minority parties to succeed in elections in the districts where a particular minority is territorially concentrated.

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<sup>197</sup> *Ibid.*, at 42.

<sup>198</sup> *Ibid.*, at 45.

<sup>199</sup> The discussion of these issue is to follow in Sections C and D.



Picture 2. Roma and Serb Communities in Kosovo.

Source: Humanitarian Community Information Center Homepage, online  
<http://www.reliefweb.int/hcic/maps/population/minority2k.jpg>

## *2. Political landscape*

The division of the population along ethnic lines is observed not only territorially, but also in the political life of the Province. Each ethnic community (especially, minorities) is concerned with protecting their rights and security. One of the ways to have a community's concerns heard and taken into account is to be represented in the organs of government. In turn, to participate in the organs of government, each ethnic community must have a political entity which represents that community.

The Kosovo political landscape is diverse in many aspects: ethnic affiliation of parties (Albanian, Serb, Turk, Bosniac, Gora, Ashkali),<sup>200</sup> different forms of political organization (political party, coalition, citizens' initiative), and different histories of particular parties (for example, some parties were founded 9-10 years ago and established themselves during the years of the struggle against the Serb oppression. Other parties were officially formed only several months before the elections), etc.

The most reliable and comprehensive data on Kosovo political organizations was generated before the 2000 municipal elections.<sup>201</sup> By August 2000 the Central Elections Commission (CEC) certified 19 political parties, 2 coalitions, 3 citizens' initiatives and 15 independent candidates to participate in the municipal elections.<sup>202</sup> All major ethnic communities had their political parties or independent candidates to contest the elections. 14 out of 19 parties and one coalition were Albanian, three parties were Bosniac, one Ashkali, one Turk and one Gora initiative. Egyptian communities had several independent candidates registered. No Serb parties registered to contest the elections.<sup>203</sup>

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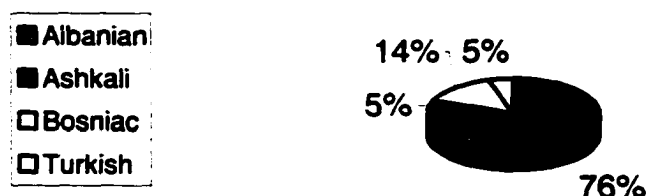
<sup>200</sup> See Appendix 2.

<sup>201</sup> It should be noted that the political landscape in the first 6-10 month after the UNMIK deployment was not that diverse. The explosion in the formation and legalization of political forces started in spring 2000 in anticipation of the October municipal elections.

<sup>202</sup> OSCE Annual Report 2000 on OSCE Activities  
[http://www.osce.org/docs/english/misc/anrep00e\\_activ.htm#Anchor-1.-41834](http://www.osce.org/docs/english/misc/anrep00e_activ.htm#Anchor-1.-41834)

<sup>203</sup> This does not mean that no Serb parties exist in the Province. A number of Serb parties have their branches in three northern municipalities. These parties had their representatives in the UNMIK-appointed municipal councils. However, in relation to the municipal elections the Serb communities adopted a strategy of non-participation: few Serbs registered to vote and no Serb parties stood for elections.

## Parties in Kosovo by Their Ethnic Affiliation, fall 2000



**Chart 2. Parties in Kosovo by their Ethnic Affiliation**

Chart 2 demonstrates that the political life of Kosovo (at least in terms of activism in contestation of elections) is dominated by Albanian parties. Although the objectives and programmes of Albanian parties significantly vary, the parties' positions overwhelmingly coincide on two points. First, an absolute majority of the parties identify the independence of Kosovo and European integration as their primary goals. Several parties (the LNDSh, the PNDSh, the PRK) advocate closer cooperation or unification with Albania. Second, all the municipal programs emphasize the immediate needs of reconstruction, such as job creation, education, health services, infrastructure, etc., but only some of them<sup>204</sup> address the issue of ethnic tolerance and minority rights.

Among Albanian parties the Democratic League of Kosovo (LDK), the Party for Democratic Progress (PDK) and the Alliance for the Future of Kosovo (AAK) stand out in popularity, resources and organization. During the past years these three parties have been the key players in the Kosovo political life. They continue to play important roles in the UNMIK structures and organs of self-government. Let us have a closer look at them.

<sup>204</sup> The issues of minority rights and commitment to ethnic tolerance are found in the programmes of the LDK, the KP, the PDK and the PShDK. See, *Political Party Guide*, online: OSCE Homepage < <http://www.osce.org/kosovo/elections/pdf/ppg-e.pdf> >



Since 1989 the LDK was a leader of the Kosovo resistance movement. During this period the organization has developed a wide net of regional offices and acquired experience in local and international policy-making. The party and its leader Ibrahim Rugova have received over 80% of the votes in 1992 and 1998 elections to the Kosovo parallel governmental structures.<sup>205</sup> Rugova's leadership was also recognized on the international level. He participated in many international negotiations on Kosovo (including the Rambouillet talks) and since December 1999 was a member of the UNMIK-created Interim Administrative Council (IAC).<sup>206</sup>

As proclaimed during the municipal electoral campaign, the general aims of the LDK are the independence of Kosovo, democratic institution-building, the rule of law and respect for minority rights. At the municipal level, the LDK prioritizes development of agriculture and infrastructure, job creation, education, and health care.

Another two parties – the AAK and the PDK – have their root in the Kosovo Liberation Army (KLA). Following the demilitarization of the KLA in 1999, the majority of its members joined one of the structures – the Kosovo Police Service, the Kosovo Protection Corps or the newly formed Party of Democratic Progress in Kosovo (PPDK).<sup>207</sup> In May 2000 the ex-KLA leader Hashim Thaci was elected the party president and the name of the party was changed to the PDK.<sup>208</sup> Before the emergence of other former KLA leaders on the political arena in 2000, the PDK was considered the sole inheritor of the KLA and the sole beneficiary of the ex-KLA support.<sup>209</sup> This position provided the PDK with membership in the IAC.

Among the major goals of the PDK are freedom, independence and democracy, ethnic tolerance and European integration. At the municipal level, it seeks to improve infrastructure, education, health care, to create jobs and to promote women's emancipation.

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<sup>205</sup> *Political Party Guide*, at 12, online: OSCE Homepage <<http://www.osce.org/kosovo/elections/pdf/ppg-e.pdf>> About parallel Kosovo structures see, Chapter I.

<sup>206</sup> The structure and the role of the IAC will be discussed in the following section.

<sup>207</sup> *Political Party Guide*, *supra* note 205.

<sup>208</sup> *Ibid.*, at 15.

<sup>209</sup> *Ibid.*

The AAK led by another ex-KLA leader - Ramush Haradinaj - is a coalition of six smaller parties.<sup>210</sup> The majority of the parties united in the AAK actively participated in the resistance movement. Two of them closely cooperated with the KLA. The AAK prioritizes political and economic reforms. It advocates that politics has to start at the grassroots, with the engagement of the people in political and social life at individual, family and community levels.

Although Albanian parties form a central segment of the Kosovo political system, there are a number of minority parties (Ashkali, Bosniac, Gora and Turk parties). The distinction between the Albanian and minority political entities can be drawn not only along the line of ethnic affiliation, but also by their political priorities. Albanian parties define the Kosovo status, more precisely, Province's independence as a top priority. Minority parties<sup>211</sup> view peace, security and minority rights as their main objectives. For them security and freedom are much more important than the debate about the future status of Kosovo. The emphasis of minority parties on security and minority rights is one of clear indicators that currently available protection of minorities is insufficient.<sup>212</sup> Because of the difference in main political goals, minority and majority parties may have fewer areas for cooperation and less incentive for the formation of grand coalitions. The result of the cooperation will to great extent depend on the willingness of both Albanian and minority parties to understand and reconcile each other's priorities.

There is one positive move in this direction. Two of the largest Albanian parties – the PDK and the LDK – included promotion of ethnic tolerance and minority rights in their platforms. This shows that they sought to moderate their positions in order to gain support of more than one ethnic group in the elections. Such moderation creates

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<sup>210</sup> It includes: the Alliance of Citizens of Kosovo (AQK), the Parliamentary Party of Kosovo (PPK), the National Movement for the Liberation of Kosovo (LKCK), the Peoples Movement of Kosovo (LPK), the Albanian Unification Party (UNIKOMB), and the Albanian Union of Christian Democrats (UShDK). See, Political Party Guide, *supra*, note 205 at 6-8.

<sup>211</sup> Here I am talking only about Ashkali, Bosniac, Gora and Turk parties, which took part in the municipal elections.

<sup>212</sup> The issue of judicial protection will be discussed in Chapter IV.

favourable ground for the pooling of votes across ethnic lines and opens the door for the formation of pre-electoral and post-electoral multiethnic coalitions.<sup>213</sup>

### **Interim conclusion**

The analysis of the Kosovo ethno-political situation leads us to the following conclusions. First, Kosovo may be considered a plural society as defined by Lijphart. The Province is territorially and politically fragmented along ethnic lines, that is, the society is divided into segments. Second, Kosovo is a society where ethnic majority rule is likely to disadvantage minorities and to be a permanent source of instability for the Province. Given the superior number of Albanians in the Province, better organization of Albanian parties and the refusal of some ethnic communities to participate in power sharing and elections (e.g., Serbs), Kosovo will apparently have an Albanian majority rule. There is a threat that ethnic majority will use its advantageous position in the organs of government in order to strengthen its own protection. At the same time, the high concentration of Serbs in Zvecan, Zubin Potok and Leposavic may lead to the exclusion of Albanian minorities from administration there and possibly their disadvantaged position in those municipalities. The ethno-territorial distinctiveness of the three northern municipalities,<sup>214</sup> reinforced by political differences (in terms of which parties are in power there), may deepen the de facto separation of Kosovo in Albanian-dominated and Serb-dominated areas. This stronger separation threatens to intensify the tension between Serbs and Albanians and may give rise to attempts of secession of the Serb municipalities from Kosovo.<sup>215</sup> Consequently, if this separation is not mitigated, it will constitute a continuous threat to reconciliation and stability in the Province.

Taking the above into consideration, it may be concluded that Kosovo needs the techniques of consociationalism in order to develop stable democratic government. As seen in Chapter I, consociationalism has certain limitations in terms of its application in Kosovo. Perhaps only its three elements – proportionality, grand coalition and mutual

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<sup>213</sup> Another thing is that Albanian parties do not need inter-ethnic coalitions to win the majority of votes. Thus, they are unlikely to enter into multiethnic coalitions unless the incentives for that are created through the electoral system.

<sup>214</sup> See, section A of this Chapter, Chapter III at 87, Chapter IV at 149.

<sup>215</sup> This can serve as a confirmation of our previous conclusion in Chapter I that segmental autonomy would not be an appropriate means for Kosovo.

veto – would be suitable for the initial stages if democracy-building in the Province. Moreover, the success of consociationalism will to a great extent depend on the way it is implemented through substantive and procedural rules adopted by the UNMIK and its organs. The next sections examine these rules in greater detail.

## **B. Development of Self-government in Kosovo**

The development of local self-government is one of the central tasks of the international administration in Kosovo. On the one hand, participation of local parties in provincial management is required by SCR 1244.<sup>216</sup> On the other hand, it is a practical necessity: without the support from local political forces, any reconstruction activity would be doomed to failure. Local organs of self-government are necessary, first, as partners of the international community in reconstruction of the Province; and, second, as a precondition for the gradual transfer of authority from international to local structures.

The self-government of Kosovo is developed in two ways: through elections and through the establishment of mixed (international-Kosovar) bodies that carry out administrative management until all elected bodies are put into operation. The creation of representative organs through elections is intended to occur in two stages - elections at the municipal level<sup>217</sup> and all-Kosovo elections.<sup>218</sup> Having opted for the "bottom- up" approach,<sup>219</sup> the UNMIK has held municipal elections first.

For the period of time until the elections were held and representative bodies were put in operation, the UNMIK had to introduce other means by which local communities

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<sup>216</sup> According to paragraph 11 of SCR 1244, the international civil administration is responsible for "organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections and *transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities.*" Emphasis added.

<sup>217</sup> Municipal elections took place on October 28, 2000.

<sup>218</sup> All-Kosovo elections are scheduled for November 17, 2001.

<sup>219</sup> In the Report on the United Nations Interim Administration Mission in Kosovo the UN Secretary-General emphasized that "democracy must take root at the municipal level" and noted that all parties and sectors of Kosovo society should be prepared to cooperate with municipal assemblies. See, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2000/1196, 15 December 2000 at 17, online: United Nations Homepage <http://www.un.org/Depts/dhl/da/kosovo/kosovo3a.htm> (date accessed: 8 February 2001).

could participate in the administration of local affairs.<sup>220</sup> The establishment of the UNMIK-Kosovar organs was adopted as means to promote such participation.

These mixed organs provided an immediate access of local political forces to the provincial and municipal decision-making. In contrast to elected organs, the composition of the UNMIK-created bodies did not reflect popular will. The representatives to provincial and municipal organs were appointed by the SRSG and the UNMIK Administrators accordingly. The appointees were chosen from political forces deemed to be the most politically influential at that time. To a certain extent, such appointments strengthened the leading position of those local forces. At large, the created organs reflected the so-called Rambouillet formula (three Kosovo Albanian political parties and their leaders who participated in the Rambouillet talks – Rugova, Thaci and Qosja). In addition to that, appointed organs sought to represent the political, religious, and ethnic diversity of Kosovo.<sup>221</sup>

To date the administration of Kosovo includes both appointed and elected organs.<sup>222</sup> The Section analyzes the powers of the Kosovo organs from two perspectives: 1) the correlation of the powers of the SRSG and the Kosovar self-government - whether the necessary preconditions are created for the development of the responsible and independent self-government; 2) the internal structure of the organs of self-government - how it reflects the principles of consociationalism and how it facilitates minority protection and interethnic reconciliation.

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<sup>220</sup> Note our previous discussion about the issue of legitimacy.

<sup>221</sup> See, composition of the Kosovo Transitional Council (KTC).

<sup>222</sup> Here is a quick reference about the system of elected and appointed organs in Kosovo: according to the Agreement between the Kosovo Albanian leaders (Rugova, Thaci and Qosja) and the SRSG of December 13, 1999 (also known as the JIAS Agreement), the citizens of Kosovo participate in management of the Province through the UNMIK appointed Joint Interim Administrative Structure (JIAS) at the provincial level and municipal councils at the municipal level. In November 2000 municipal boards and councils were replaced by the newly elected municipal assemblies. In contrast, there are currently no elected representative bodies at provincial level. The JIAS is functioning until the all-Kosovo elections are held in November 2001.

### *1. Constitutional Framework for Provisional Self-Government in Kosovo*

On May 15, 2001 the SRSG promulgated the Constitutional Framework for Provisional Self-Government of Kosovo.<sup>223</sup> The adoption of the Framework became crucial for the future of Kosovo in many respects. First, it more clearly defined the objectives of the international reconstruction in Kosovo (the preamble stated the goal of developing parliamentary democracy).<sup>224</sup> Second, it promoted the further transfer of authority from the international administration to Kosovo authorities.<sup>225</sup> Third, it clarified the correlation of power between the institutions of self-government and the international administration.<sup>226</sup> Fourth, it proved that leaders of different communities and parties can effectively cooperate with each other and with the international officials in the process of Kosovo reconstruction.<sup>227</sup>

The Framework regulates the most urgent issues of constitutional government: individual and collective rights, structure and competence of the Kosovo legislature, the executive and the judiciary as well as the authority of the SRSG and KFOR, which they retain over the provincial affairs.

The Framework provides for the establishment of the Provisional Institutions of Self-government, which “shall work ... towards ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, with a view to facilitating the determination of Kosovo’s future status...”<sup>228</sup> These institutions have not been established yet, but their formation will start with the all-Kosovo elections in November 2001.

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<sup>223</sup> *The Constitutional Framework for Provisional Self-Government of Kosovo*, UNMIK/Reg/2001/9 (2001) [hereinafter *Constitutional Framework*].

<sup>224</sup> *Ibid.*, preamble.

<sup>225</sup> The Framework grants to self-government many responsibilities, which were concentrated with the UNMIK, thus allowing the local forces to assume real decision-making power. For the discussion of these powers see, below.

<sup>226</sup> The Framework distinguishes between the areas of responsibility of the UNMIK and those of the self-government. See, discussion below.

<sup>227</sup> The text of the Framework was elaborated during the seven weeks of negotiation among Kosovo political parties, ethnic and religious communities, civil sector and the international administration. It represented a compromise in the position of the local political forces and the international administration. See, UNMIK Press Release of 15 and 16 May 2001, online: UN Homepage < <http://un.org/peace/kosovo/press/templ.pr.581.html> > (date accessed: 20 may 2001).

<sup>228</sup> *Ibid.*, preamble.

*a. Competencies of the Provisional Institutions*

The Provisional Institutions will take over the UNMIK-created organs at the provincial level. The Provisional Institutions are granted responsibilities over a wide range of local affairs, including economic regulation, industry and investment, trade, education, health, transport and telecommunications, agriculture, etc.<sup>229</sup> They are also assigned special responsibilities in judicial affairs, mass media and emergency preparedness. However, all international and external contacts are exercised only in coordination with the SRSG.

The balance of power among the branches of self-government clearly points to parliamentary democracy. The legislative authority in Kosovo will be exercised by the Assembly. The Assembly has several key powers: to adopt laws and resolutions on the matters within the competence of the provisional self-government; to elect the President of Kosovo; to appoint Kosovo officials, including the Prime-Minister and ministers of the government; to endorse international agreements; and to decide on a motion of no-confidence in the government.<sup>230</sup>

In contrast to the powers of the Assembly, the President of Kosovo has a rather limited role. He is elected by the Assembly. His main powers include proposing the candidature of the Prime-Minister, exercising external relations in coordination with the SRSG and reporting to the Assembly on the state of affairs in Kosovo.<sup>231</sup>

The Government of Kosovo has executive authority. It is responsible for proposing draft laws to the Assembly and implementing the laws adopted by the Assembly.<sup>232</sup> The Assembly can exercise control over the government through its power to express no-confidence in it. Given the necessity to have the government functioning, the Framework specifies that the Assembly can express no-confidence only if it simultaneously appoints a new prime-minister and ministers of the government.<sup>233</sup>

The division of power in this form of parliamentary democracy creates the generally favourable ground for the development of consociationalism in Kosovo. In fact,

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<sup>229</sup> *Constitutional Framework*, *supra* note 223, ch.5.

<sup>230</sup> *Ibid.*, s. 9.1.26.

<sup>231</sup> *Ibid.*, s. 9.2.

<sup>232</sup> *Ibid.*, s. 9.3.

<sup>233</sup> *Ibid.*, s. 9.3.10.

parliamentary democracy is considered the only form of government that allows the development of consociationalism.<sup>234</sup> Thus, the founding preconditions for more inclusive democratic government for Kosovo are in place. In the process of successful implementation of this model, a lot depends on the chosen correlation of powers between the SRSG and the Provisional Institutions (in terms of how much control the international administration retains over the developing self-government) as well as on the composition and decision-making procedures within the Provisional organs themselves.

*b. Correlation of the powers of the SRSG and Provisional Institutions*

When the Framework will be implemented, Kosovo will have a system of administration that comprises two structures – the Provisional Institutions and the international administration. Although structurally and in terms of the balance of power the Provisional Institutions can be viewed as an independent system of government, they are limited in terms of competence. The Framework specifically distinguishes the powers of the SRSG and the powers of the Provisional Institutions. In many respects, the Provisional Institutions remain under control of the international administration. The establishment of the provisional self-government does not affect or diminish the powers of the SRSG to ensure full implementation of SCR 1244.<sup>235</sup> A wide range of key economic and political matters continues to be the exclusive domain of the SRSG. The SRSG retains the two most important powers: to issue Regulations and to appoint and remove international officials in Kosovo. In addition to that, the SRSG has reserved powers in relation to monetary policy, the UNMIK Customs Service, the Kosovo Protection Corps, law enforcement and correctional service, international relations, administration of state and public property, cross-border transit of goods and other matters.<sup>236</sup> At the same time, the SRSG has to take necessary steps to facilitate the transfer of powers and responsibilities to the Provisional Institutions.<sup>237</sup> An interesting point is that, on the one hand, the Provisional Institutions are granted a number of powers that were previously exercised by the SRSG on behalf of the international administration.

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<sup>234</sup> See, Lijphart, *supra* note 41, Van Parijs, *supra* note 59.

<sup>235</sup> *Constitutional Framework*, *supra* note 223, ch.12.

<sup>236</sup> *ibid.*, s.8.1.

<sup>237</sup> *Constitutional Framework*, *supra* note 223, s. 14.2.



On the other hand, notwithstanding this transfer, the scope of the powers of the UNMIK did not decrease. Rather, I would say, some powers became “dormant” – they are exercised by the Provisional Institutions, but the SRSG can intervene at any time when he considers this to be necessary to ensure full implementation of SCR 1244. Interestingly, the power to introduce amendments to the Framework is also usurped by the SRSG. He can make such amendments on his own initiative or upon a request supported by two-thirds of the members of the Assembly.<sup>238</sup> Moreover, such an authority of unilateral amendment of the Framework is not limited in time and presumably can be exercised even when the Provisional Institutions are substantially developed (given that the international civil presence continues in the Province).

The power of the SRSG to amend the Framework unilaterally is highly controversial. It means that the people whose will is expressed through the Assembly are excluded from the government, that they are denied one of the essential rights – to define the way of their future development. In this respect, the unilateral amendment of the Framework by the SRSG not only undermines the authority of the developing self-government, but also contradicts the earlier affirmed principles of the involvement of local parties in decision-making<sup>239</sup> and the democratic principles of the UN.<sup>240</sup>

Many powers of the SRSG and of the Provisional Institutions are closely interrelated. Even the normatively stipulated distinction between their areas of responsibility may not be a sufficient guarantee against confusion about their respective competencies. One of the first concerns is parallel exercise of functions by the SRSG and the Provisional Institutions over the same matter and the problem as to whose decision takes precedence. For instance, the Provisional Institutions are responsible for economic, fiscal and budgetary policy.<sup>241</sup> At the same time, the SRSG is the final authority to set financial and policy parameters. The problematic point is the interpretation of these two provisions in relation to each other. The “final authority” of the SRSG may mean either that he can overrule the decisions of the Provisional Institutions or that he can make a decision if the Provisional Institutions are incapable of reaching consensus on an issue or

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<sup>238</sup> *Ibid.*, s. 14.3.

<sup>239</sup> See, SCR 1244, *supra* note 106, preamble and para 10; the JIAS Regulation, s. 1(a).

<sup>240</sup> See, also discussion about moral issues of peace-building in Chapter II(B).

<sup>241</sup> *Constitutional Framework*, *supra* note 223, s. 5.1(a) and s. 5.1(b).

both these possibilities. In any event, the “final authority” gives the SRSG power to control the decision-making of the Provisional Institutions and even substitute their decisions with his own. While the “final authority” of the SRSG may be useful to overcome procedural deadlock<sup>242</sup> and elaborate more effective financial policy, its frequent exercise is likely to be objected to by the Kosovar organs as too interventionist.

Another example concerns the power of the SRSG to appoint and remove judges and prosecutors. According to s. 5.3(a), the Provisional Institutions are responsible for “making decisions regarding the appointment of judges and prosecutors.”<sup>243</sup> At the same time, the SRSG has a reserved power of “exercising final authority regarding the appointment, removal from office and disciplining of judges and prosecutors.”<sup>244</sup> The ultimate scope of this “final authority” is not clear. Most likely, this power means that the SRSG is in position to remove a judge or prosecutor appointed by the Provisional Institutions and unilaterally appoint a new person. The preservation of controlling powers of the SRSG is necessary to oversee the newly elected organs and to assist their initial activities. At the same time, the frequent use of the broad powers of the SRSG may undermine and limit the power of legitimately created institutions of self-government.

On these two examples we have seen that provisions of the Framework can be interpreted in a variety of ways, conferring a broader or narrower authority on a particular organ. There may be many different opinions on the interpretation of the same provision, each of which may be adequate. The question is not in finding a right interpretation, but the one which is politically acceptable and provides an equitable result and consistency in the approach to self-government and its development. For this reason, there is a need for authoritative interpretation of the Framework’s provisions. The SRSG, with his ample powers of supervision over the Provisional Institutions also has a final say in the interpretation of the Framework. According to Chapter 12, the SRSG can determine whether the actions of Provisional Institutions are consistent with SCR 1244 and the Constitutional Framework,<sup>245</sup> which necessarily involves interpretation of the powers of Provisional Institutions and of the SRSG.

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<sup>242</sup> See, discussion about mutual veto in Chapter I.

<sup>243</sup> *Constitutional Framework*, *supra* note 223, s. 5.3 (a).

<sup>244</sup> *Ibid.*, s. 8.1(g).

<sup>245</sup> *Ibid.*, ch.12.

None of the characteristics of peace-building directly relates to the limits on the powers of the SRSG. The powers of the SRSG should be restrained by the general aim of peace-building for the development of sustainability and independence of local organs. The usurpation of the power to interpret the Framework by the SRSG, may slow down or preclude the Kosovo's constitutional development – an area crucial for the well-rounded protection and inclusiveness of minorities.

The power of the SRSG to interpret the Framework's provisions also creates certain concerns about the imposition of "Western" values and understanding of the reconstruction process. In my view, the legitimate interpretation of the Framework should emanate from a judicial organ. In the spirit of the democratic tradition, the Supreme Court of Kosovo<sup>246</sup> should have the power to interpret the Framework's provisions. However, there is nothing in the Framework that suggests such authority.

*c. Composition and decision-making in the Provisional Institutions*

As mentioned before, the functioning of consociationalism to a great extent depends on the design of the decision-making procedures and the composition of the organs of government. These requirements should be unified by a common aim of providing more stable and inclusive government.

The Constitutional Framework establishes special requirements for the composition of the provincial organs and decision-making procedures in the Provisional Institutions, which reflect some consociational principles. Let us first examine these procedures and the potential effect they may have on the protection of minority interests.

The popularly elected Assembly consists of 120 members elected by the population. 100 seats are distributed among all parties, coalitions, citizens' initiatives and independent candidates proportionately to the number of votes received by them in the elections.<sup>247</sup> 20 are seats reserved for non-Kosovo Albanian communities. Among them, 10 seats are allocated to parties representing Serb communities, 4 seats for the Roma,

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<sup>246</sup> The Supreme Court will have more legitimacy in its interpretation as a collective organ, given that it is consociationally composed.

<sup>247</sup> *Constitutional Framework*, *supra* note 223, s. 9.1.3(a).

Ashkali and Egyptian Communities,<sup>248</sup> 3 – for the Bosniac Community, 2 for the Turkish Community and 1 for the Gorani Community.<sup>249</sup> Within each category the seats are distributed proportionately to the number of votes received by respective parties in the elections.

The existence of reserved seats in the Assembly and the method of allocating them may be regarded as an attempt to satisfy two principles of consociationalism: proportionality and grand coalition. The very existence of reserved seats is a guarantee that the leaders of major ethnic segments of the Kosovo society are included in the Assembly. Their inclusion is a precondition for cooperation among various leaders, which, in turn, may help the formation of a grand coalition. Proportionality used for seat allocation ensures that each community has appropriate weight in decision-making.

The composition of the organs created by the Kosovo Assembly is also influenced by the principles of proportionality and grand coalition. For example, the Chairmanship of the all Committees of the Assembly has to be distributed proportionately among parties and coalitions represented in the Assembly.<sup>250</sup> The seats of the Budget Committee are allocated proportionately among parties and coalitions represented in the Assembly.<sup>251</sup> The Committee on Human Rights and Interests of Communities has to include two members of each Kosovo community elected by the Assembly.

Generally, the decisions of the Assembly, including adoption of laws, are made by majority of the present and voting members.<sup>252</sup> This threshold is higher - two-thirds majority - for the election of the President of Kosovo.<sup>253</sup> However, there is no special requirement that a candidate for president has to receive minority support. Since most likely the Assembly will be more than 2/3 Albanian, there will be no incentive for a candidate to moderate his position in order to try to win minority support. Thus, the procedure for the election of the president does not seem to increase the chance of having

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<sup>248</sup> Roma, Ashkalia and Egyptians were often viewed by international actors as interconnected and ethnically similar groups. Probably for this reason, they altogether are allocated four seats in the Assembly. This seat allocation is likely to produce disagreements among the Roma, Egyptians and Ashakaeli groups, which view themselves as distinct communities.

<sup>249</sup> *Constitutional Framework*, *supra* note 223, s. 9.1.3 (b).

<sup>250</sup> *Ibid.*, s. 9.1.21.

<sup>251</sup> *Ibid.*, s. 9.1.11.

<sup>252</sup> *Ibid.*, s. 9.1.33.

<sup>253</sup> *Ibid.*, s. 9.2.8.

a panethnic candidate as a President of Kosovo. Although the president does not have significant powers, the very presence of nationalistic politician on this post would have a negative impact of the reconciliation processes in Kosovo.

In relation to the adoption of laws, the Framework incorporates a very interesting procedure to protect minority interests against being overridden by the ethnic majority of the Assembly. Instead of a mutual veto, which threatens procedural deadlock, it introduces another procedure, which allows both to escape the deadlocks of the veto and to protect the interests of minorities. Within 48 hours from the approval of a law by the Assembly six members of the Assembly can submit a motion to the Presidency claiming that the law in total or in part violates vital interests of the community to which they belong.<sup>254</sup> The Presidency of the Assembly designates a panel which examines the matter and prepares a “consensus proposal”<sup>255</sup> to the Assembly. If the Assembly rejects the proposal or accepts a proposal for the rejection of the motion, the law stands as previously adopted.<sup>256</sup> In my opinion, this model of a moderate veto is a particularly good idea which allows to safeguard the interest of minorities, but reduces the risk of deadlock or delay in resolution of vital public matters. In this respect, such practice may be viewed as contributing a new tool to the consociational model. The veto is utilized only in relation to the adopted laws – the means that have serious impact on the position of minorities.

Similar to the Kosovo Assembly, the government is composed sensitively of ethnic division. The Framework does not specify the number of ministers, but requires that at least two of them be from communities other than the community that has the majority in the Assembly.<sup>257</sup> At least one of those ministers has to be from the Serb community and another from another community. The selection of these ministers is exercised during consultation with parties representing non-majority communities. This procedure resembles grand coalition decision-making where minorities have to cooperate

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<sup>254</sup> *Constitutional Framework*, *supra* note 223, s. 9.1.39.

<sup>255</sup> *Ibid.*, s. 9.1.40.

<sup>256</sup> *Ibid.*, s. 9.1.42.

<sup>257</sup> *Ibid.*, s. 9.3.5.

and compromise in order to select the most suitable candidates. The decisions of the Government have to be reached by consensus if possible.<sup>258</sup>

Generally, I would assess the composition and the decision-making procedures in the Kosovo Provisional Institutions as sound and sensitively incorporating the some principles of consociationalism. Some procedures and guarantees are particularly well tailored. For example, the moderate mutual veto seems to provide sufficient flexibility for both protection of minority interests and effective decision-making. Another important achievement is that the incentives for grand coalition and the principle of proportionality are incorporated not only in relation to the legislative branch, but also in relation to the executive and the organs created by the Kosovo Assembly. This way the application of consociationalism becomes fairly well-rounded and coherent. The exception to this coherency is the procedure for the election of the President of Kosovo, which does not sufficiently guarantee the panethnicity of the head of the Province. On the one hand, I agree that not every step of the decision-making should be burdened with the pursuit of panethnicity. On the other hand, the President of Kosovo is one of the key political figures in the Province (although he nominally does not have very ample powers) and the absence of any consociational-type requirements for his election may become a serious impediment for the success of consociationalism in Kosovo.

## **2. Joint Interim Administrative Structure**

The JIAS is an organ that currently provides the participation of Kosovars in the decision-making at the provincial level.<sup>259</sup> The JIAS was established by the Agreement signed between the leaders of the “Rambouillet formula” (Hashim Thaci, Ibrahim Rugova, Rexhep Qosja) and the SRSG Bernard Kouchner on December 13, 1999. The Agreement determined that the citizens of Kosovo “will work in the Joint Interim Administrative Structure through participation in the Kosovo Transitional Council, the Interim Administrative Council, Administrative Departments, as well as in the different administrative structures at the municipal level.”<sup>260</sup> The creation of the JIAS sought to resolve several problems: eliminate parallel governments, which undermined the

<sup>258</sup> *Constitutional Framework*, *supra* note 223, s. 9.3.16.

<sup>259</sup> The structure is intended to be in operation until the Provisional Institutions are put in place.

<sup>260</sup> Agreement, 13 December, 1999, <http://www.un.org/peace/kosovo/press/agree.htm>

authority of the UNMIK;<sup>261</sup> integrate minorities in governing structures; and promote cooperation among local actors as well as between local political forces and the UNMIK.

The main points of the Agreement were subsequently endorsed in the UNMIK Regulation 2000/1 on a Joint Interim Administrative Structure, which authorized the establishment of the JIAS. The Regulation affirmed that local political forces share administrative management of the Province with the UNMIK.<sup>262</sup> The JIAS became a unified organ of Kosovo administrative management. All Kosovo structures as of December 1999, whether they were legislative, executive or judicial, had to integrate into the JIAS.<sup>263</sup> Importantly, this also concerned the Kosovo parallel governments - the 'Provisional Government of Kosovo' led by Thaci and the 'Presidency of the Republic of Kosovo' associated with the LDK. On merger in the JIAS, those structures ceased to exist.<sup>264</sup>

The JIAS is placed within the structure of the UNMIK and is headed by the SRSG Office (See, illustration 2). No JIAS body has power to issue binding decisions and serves only as a consultative body for the UNMIK. The SRSG retains full legislative and executive authority in the Province.

The JIAS consists of two bodies: the Kosovo Transitional Council and the Interim Administrative Council. The Kosovo Transitional Council (KTC) is the highest consultative body of the JIAS. The Interim Advisory Council (IAC) is an executive board for the JIAS and an advisory body for the SRSG. The IAC represents the political forces of Kosovo, while the KTC is intended to express the voice of the wider Kosovo community – religious and community leaders, NGO sector, independents.

The inclusiveness of local communities and political elites in both organs of the JIAS was tailored in light of the grand coalition and proportionality principle. In relation

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<sup>260</sup> Agreement, 13 December, 1999, <http://www.un.org/peace/kosovo/press/agree.htm>

<sup>261</sup> At the time of the UNMIK deployment, there were two shadow governments in Kosovo: one associated with the KLA (the 'Provisional Government of Kosovo' headed by Thaci) and another - with the LDK (the 'Presidency of the Republic of Kosovo').

<sup>262</sup> *Regulation on the Kosovo Joint Interim Administrative Structure*, UNMIK/Reg/2000/1, s.1(a) (2001), online: United Nations Homepage <<http://www.un.org/peace/kosovo/pages/regulations/reg01.html>> (date accessed: 21 January 2001).

<sup>263</sup> *Ibid.*, s. 1(c).

<sup>264</sup> *Ibid.*

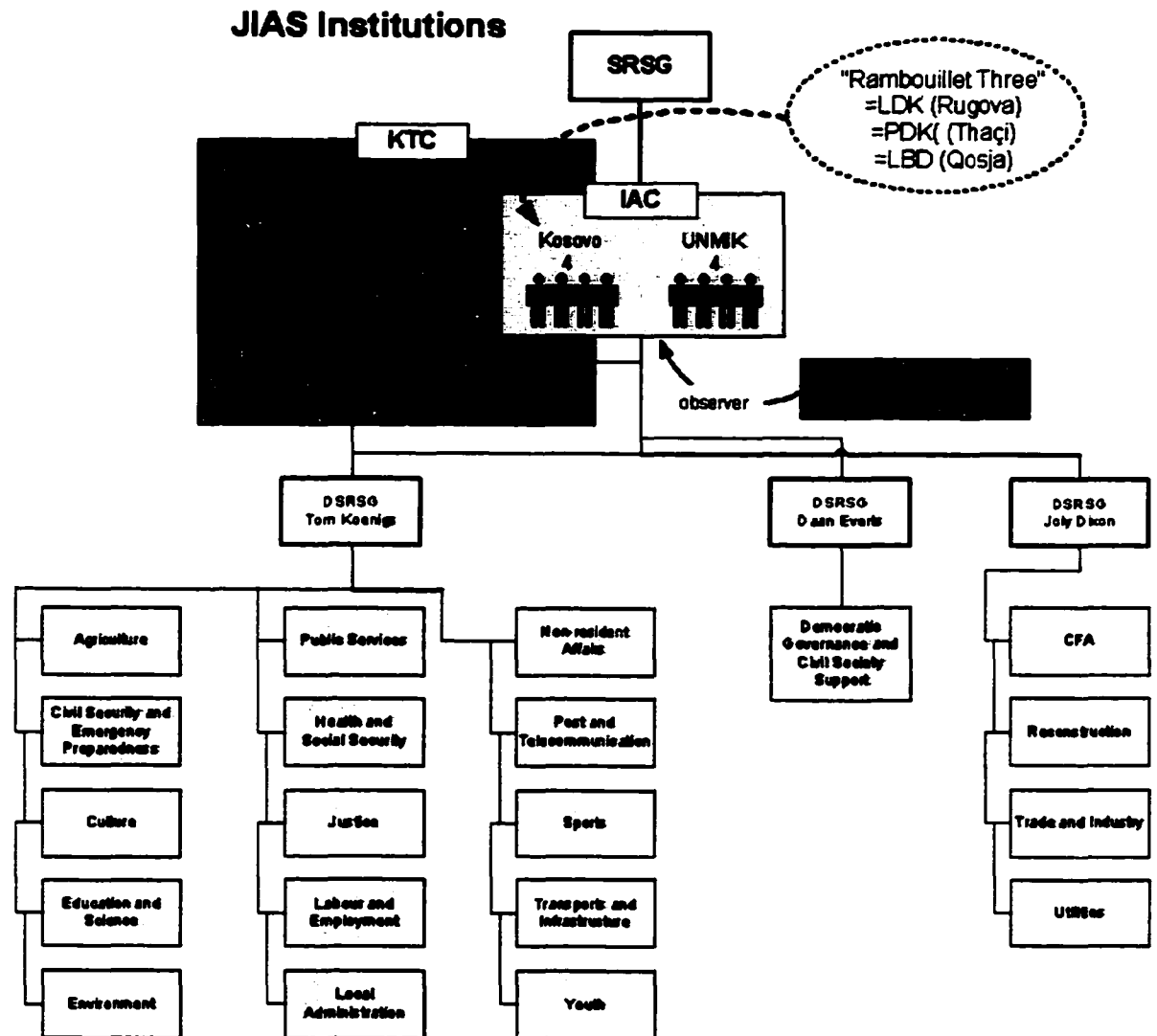
to the IAC these principles are applied in a “selective” way. The IAC consists of eight members, four of which are representatives from Kosovo and another four representatives from the UNMIK.<sup>265</sup> All the members are appointed by the SRSG. The Kosovo representatives should include three Kosovo Albanians and one Kosovo Serb. Currently, the IAC includes three Kosovo Albanian leaders (Rugova, Thaci and Qosja – Rambouillet formula), a representative of the Serb National Council (Rada Trajkovic) as an observer, four UNMIK representatives and an observer for each side.<sup>266</sup> Observers can participate in discussions, but do not have a right to vote. Such composition of the IAC may be regarded as a grand coalition between the international administration and the main (Albanian and Serb) political segments of the Kosovo society, but it does not represent a grand coalition of the segments of the whole Kosovo society. I see the explanation for this selective inclusiveness in the following. First, at the time of the formation of the JIAS it was not possible to ensure the representation of all the Kosovo communities. Large numbers of Kosovars remained in refuge abroad or were internally displaced. Consequently, there was no opportunity to obtain a clear idea about the numbers of particular minorities that required representation. Moreover, many minority communities were not organized politically to effectively represent the whole ethnic segment in the JIAS. Second, it might have been easier and more efficient to negotiate a political agreement with the key Kosovar leaders rather than with a handful of leaders of larger and smaller segments.

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<sup>265</sup> *Regulation on the Kosovo Joint Interim Administrative Structure*, *supra* note 262, s. 4.

<sup>266</sup> Interim Administrative Council, online: United Nations Homepage <http://www.un.org/peace/kosovo/pages/twelvemonths/jias.html> (date accessed: 18 November 2000).





**Picture 3. The Structure of the JIAS.**

Source: UN Homepage, United Nations Interim Administration in Kosovo

<http://www.un.org/peace/kosovo/pages/twelvemonths/jiasimages.html>

The two main powers of the IAC are to make recommendations to the SRSG in regard to the regulations to be adopted or changed and to provide policy guidelines for 20 Administrative departments. The decision-making procedures of the IAC represent a form of a mutual veto: "Members of the Interim Administrative Council shall try, to all

possible extent, to reach consensus.”<sup>267</sup> This formula, on the one hand, requires consensus. On the other, it permits derogation from the requirement of consensual decision-making, thus, mitigating the danger of deadlock. The Regulation also incorporates an additional safeguard against deadlock: the SRSg can make a decision himself if the IAC is not able to do so by consensus or by three quarter majority.<sup>268</sup> In addition to this, the SRSg is able to control the decisions through his another power: even if a decision is made by consensus or by three quarter majority of the IAC, the SRSg can advise the Council to make a different decision.<sup>269</sup> At the same time, the concern about deadlock was not very high because the IAC served as a forum for the expression of opinions of the local communities, but not as an organ adopting binding decisions where outcomes may be vetoed. In this respect, the power of the SRSg can be viewed as an expansion of the coercive power of the international administration rather than the means to overcome deadlock associated with mutual veto.

Although the IAC does not have power to produce binding decisions that affect the Province, the body plays an important role in the more effective exercise of the international administration. First, it helps to promote dialogue between the leaders of the major Kosovo political forces.<sup>270</sup> Second, it is a mechanism for providing greater legitimacy to the UNMIK decisions<sup>271</sup> and a way of obtaining political support to international initiatives among local structures.

The KTC represents the Kosovo political, ethnic and religious groups. It consists of 36 members. Among them are 4 Kosovo members of the IAC, 11 representatives of Kosovo political parties,<sup>272</sup> 3 representatives of religious communities,<sup>273</sup> 10 civil society

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<sup>267</sup> *Regulation on the Kosovo Joint Interim Administrative Structure*, *supra* note 262, s. 6.1.

<sup>268</sup> *Ibid.*, s. 6.3. See, the suggestion that was made in Chapter I concerning the possibility of international intervention in order to prevent deadlocks associated with mutual veto.

<sup>269</sup> *Ibid.*, s. 6.2, 6.3.

<sup>270</sup> The IAC is not exactly an example of a grand coalition because it includes only the Kosovo political elites – the three parties that participated in the Rambouillet talks – and a Serb representative in recognition of the importance of the Serb segment in the Kosovo society. Because of this selective inclusiveness the IAC represents a coalition not of all segments of the Kosovo society, but only of those deemed to be the most influential.

<sup>271</sup> The UNMIK does not make decisions unilaterally, but consults with the local parties. This helps to reduce the criticism of the neo-colonialist nature of an international administration.

<sup>272</sup> The following parties have their representatives in the KTC: LDK, PLK, PDK, PRK, LKCK, PPK, LBD, PShDK, PSDK. An interesting thing is that all of them are Albanian. The only

representatives, and 8 representatives of national communities.<sup>274</sup> Because of its more comprehensive composition (compared to the IAC), the KTC more resembles a grand coalition as defined by Lijphart. Interestingly, this grand coalition body has more limited competence than the “elite club” of the IAC. The Regulation on the Establishment of the JIAS does not spell out the competencies assigned to the KTC. This fact is surprising. The UNMIK sought to involve the local parties in provincial management, but it does not give any specific powers to an organ which broadly represents Kosovo society. This state of affairs is, however, understood from the practical perspective. It was easier for the UNMIK to deal with several most influential leaders rather than debate issues with numerous leaders of smaller segments.

The JIAS was not intended to serve as an organ of self-government. Rather, the structure was designed as means to assist the more effective work of the UNMIK. Perhaps due to the “assistant” role of the JIAS, the principles of consociationalism were applied to it in a limited way. The proportionality principle - an important precondition for a variety of opinions and perspectives - was sufficiently observed only in one of the JIAS organs, the KTC. The mutual veto existed in a very weak form in the IAC and was not prescribed for the KTC. The weak mutual veto might be seen as appropriate for the JIAS, which played a consultative rather than a real decision-making role in the Kosovo administration.

The structure of the JIAS allows for both close cooperation between the SRSG and Kosovo leaders (through the IAC) and consideration of the opinion of the wider Kosovo community (through the KTC). Neither of the JIAS organs has legislative or executive authority. Moreover, the SRSG has significant control over the structure by virtue of his powers to appoint the JIAS members and influence the decision-making. Thus, I see the importance of the JIAS in two areas. First, it has a symbolic nature of power sharing between the UNMIK and local political forces. This power sharing confers more legitimacy on the UNMIK decisions. Second, it provides an opportunity to obtain support for international initiatives by Kosovo political, community and religious leaders.

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explanation that I can find for this is that the major part of minority parties was not officially formed at that time. However, this explanation does not seem to be convincing enough.

<sup>273</sup> Muslim community, Roman Catholic Church, Serb Orthodox Church.

<sup>274</sup> Turks, Roma, Serbs, and Bosniacs.

Through the JIAS, the UNMIK partially resolved one of the controversies of peace-building – retaining the full control of the international administration over the provincial decision-making, but at the same time securing sufficient legitimacy for its decisions.<sup>275</sup>

### 3. Municipal boards and councils

At the municipal level the system of interaction between the UNMIK officers and local political forces was designed similarly to the JIAS described above.<sup>276</sup> A municipal board appointed by an UNMIK Municipal Administrator was put in charge of the municipal administration.<sup>277</sup> The local parties and communities participated in administration through municipal councils also appointed by the Municipal Administrator. A municipal council, which represented the citizens of the municipality,<sup>278</sup> served as a consultative body to the Municipal Administrator. The Regulation on the Joint Interim Administrative Structure, which also serves as the basis for the structure of the municipal administration, does not refer to any consociational-type techniques either in regard to the composition or decision-making in Municipal Councils.<sup>279</sup>

The analysis of the data on municipal councils and boards appointments,<sup>280</sup> gives rise to the conclusion that representatives to municipal councils were appointed with an attempt to proportional representation of each party and ethnic community in a given municipality. Although attempts were made to ensure wide representation of political parties and other actors in municipal boards and municipal councils, these bodies, as a rule, were dominated by the largest ethnic majority parties registered in a municipality.

Since prior to the elections there was no authoritative reference as to the level of popular support for a particular party, the appointments from parties representing the

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<sup>275</sup> I mean that the involvement of the local parties in decision-making mitigates the critique that peace-builders impose the solutions that they deem appropriate.

<sup>276</sup> Please, note that the structure has changed after the 2000 municipal elections. The discussion of the current powers of municipalities is to follow.

<sup>277</sup> *Regulation on the Kosovo Joint Interim Administrative Structure*, *supra* note 262, s..8.1.

<sup>278</sup> *Ibid.*

<sup>279</sup> The requirement that “the Municipal Council shall represent the citizens of the municipality” may be interpreted as a requirement for proportionate representation. However, I am inclined to think that this phrase means that the Municipal Councils are working in capacity of representative organs for a municipality.

<sup>280</sup> *Profiles of the Municipalities in Kosovo*, online: OSCE Homepage [http://www.osce.org/kosovo/documents/reports/municipal\\_profiles/](http://www.osce.org/kosovo/documents/reports/municipal_profiles/) (date accessed: 3 May 2001).

same ethnic group usually were contingent on the authority of that party within the JIAS (and particularly in the IAC). Consequently, in the majority of Kosovo municipalities, the LDK and the PDK had more seats than other Albanian parties. Minorities often were not sufficiently represented even in multiethnic municipalities.

At the provincial level the UNMIK developed a rather elaborate structure for the involvement of diverse elements of Kosovo society in the administration of the Province. In contrast, at the municipal level the consociational techniques were given less attention. In my opinion, such a step is consistent with the situation in Kosovo in 1999 and early 2000. The elaboration of a certain political settlement and stability in Kosovo was primarily contingent on the agreement between the main Kosovar leaders and the UNMIK. In my view, one of the tendencies of Kosovo political life is that authority and decision-making flows from the center to the peripheries. The parties' local offices follow the stance of the headquarters, rather than actively participate in shaping the party's position. Thus, obtaining support and consensus of the main Kosovar leaders was the main precondition for more or less permanent political settlement. Consequently, the UNMIK was more concerned with the functioning of the organs at the provincial than at the municipal level.

#### **4. Powers of municipalities**

After the 2000 October elections in Kosovo the structure of the municipal administration and powers of the municipal organs were altered. The change took place according to Regulation 2000/45 on Self-government of Municipalities in Kosovo. The Regulation spells out the substantive and procedural details of the "democratic and autonomous self-government at the municipal level."<sup>281</sup> Most importantly, it defines the powers of municipalities and the relations between the Central Authority and a municipality. It also sets up the foundations for minority participation in municipal decision-making.

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<sup>281</sup> *Regulation on Self-government of Municipalities in Kosovo*, UNMIK/Reg/2000/45, s. 1, online: [United Nations Homepage](http://www.un.org/peace/kosovo/pages/regulations/reg045.html) <  
<http://www.un.org/peace/kosovo/pages/regulations/reg045.html>> (date accessed: 1 June 2001).

According to the Regulation, municipalities are the basic territorial unit of local self-government, which exercise all powers not expressly reserved to the UNMIK.<sup>282</sup> Such autonomy is not precisely segmental autonomy as described by Lijphart. According to him,<sup>283</sup> segmental autonomy is given to a segment of a society, not merely to a territorial unit. In the case of Kosovo, territorial units do not necessarily coincide with the territorial concentration of ethnic minority segments. This may be true only for the three northern municipalities inhabited by Serbs. In other municipalities minorities are concentrated in particular areas. For them, segmental autonomy would be a level of self-government lower than municipal (e.g., a district).

The highest representative body of a municipality is the Municipal Assembly<sup>284</sup> elected directly by the people. Municipalities are responsible for a wide range of local affairs, including licensing of building and other development; management of municipal property; health care; primary and secondary education; public services; social services; and control over public utilities, etc.<sup>285</sup> Municipalities do not have power over local police, which remains under the Central Authority. The responsibility for financial administration will not be transferred to municipalities until an independent auditor certifies that necessary management systems are in place.<sup>286</sup>

As a general rule, the decisions of Municipal Assemblies and their organs are made by simple majority of present and voting members.<sup>287</sup> If they are made by majority, it is quite probable that the ethnic majority will be able to make key decisions without minority support. However, such important municipal officials as the president of the Assembly<sup>288</sup> and the Deputy-president are elected by two-thirds majority.<sup>289</sup>

The Regulation provides for the mechanisms of control over the activities of municipal administration (in terms of both general administration and protection of

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<sup>282</sup> *Ibid.*, s. 2.

<sup>283</sup> Lijphart, *supra* note 41 at 14.

<sup>284</sup> *Ibid.*, s. 10.1.

<sup>285</sup> *Ibid.*, s. 3, 3.1.

<sup>286</sup> *Ibid.*, s. 46.2.

<sup>287</sup> *Ibid.*, 14.4.

<sup>288</sup> The President of the Assembly is responsible for general supervision of the execution of decisions adopted by the Assembly and of the financial administration of the municipality. He or she also has other responsibilities assigned to him/her according to the Statute and the Rules of Procedure. *Ibid.*, s. 28.

minorities). Supervision over the actions of municipalities is exercised at three levels: by the Central Authority, by the Municipal Administrator and by the Provisional Institutions of Self-government.

The responsibilities of the Provisional Institutions in the field of local administration will be two fold. On one hand, the Provisional Institutions provide guidance and assistance to municipalities. On the other, they supervise municipalities in a number of ways. For example, they oversee the municipalities' compliance with powers delegated to them and monitor the quality of municipal services.<sup>290</sup>

The Regulation on Self-Government of Municipalities reserves the right of the Central Authority to exercise administrative supervision over municipalities.<sup>291</sup> The SRSG can set aside decisions of municipalities if they are in conflict with SCR 1244 or do not "sufficiently take into account the rights and interests of the communities which are not in the majority in the territory of the municipality."<sup>292</sup> He can remove members of municipal assemblies for misconduct and dissolve an Assembly.<sup>293</sup> The SRSG can issue Administrative Directions to municipalities concerning municipal budgets and finances.<sup>294</sup>

Another important power of the SRSG concerns minority protection. The SRSG can co-opt additional members to the Assembly to ensure representation of communities according to SCR 1244.<sup>295</sup> This power allows the SRSG to exercise post-facto "correction" of the electoral results. Section D of this Chapter describes how the SRSG used this power in relation to the municipal elections.

The Municipal Administrator, as an agent of the Central Authority, exercises immediate control over decision making at the municipal level. He can intervene to ensure compliance of the decisions with SCR 1244, including the observance of

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<sup>289</sup> *ibid.*, s. 24.1.

<sup>290</sup> *Regulation on Self-government of Municipalities in Kosovo*, *supra* note 281, s. 5.2.

<sup>291</sup> *Ibid.*, s. 3.5.

<sup>292</sup> *Ibid.*, s. 47.2. One can argue about the too broad construction of this provision. The determination of what remedies "sufficiently take into account the rights and interests of the communities which are not in the majority in the territory of the municipality" may be very subjective. It confers wide discretion on the SRSG in interpretation and, basically, creates no barrier for his interference at the municipal level.

<sup>293</sup> *Ibid.*, s. 47.5.

<sup>294</sup> *Ibid.*, s. 47.8

fundamental human rights and interests of communities.<sup>296</sup> An Administrator can suspend a decision or refer the matter to the SRSG. He approves the budget and continues to be responsible for the administration of municipal property.<sup>297</sup>

Similarly to the SRSG, the Municipal Administrator has powers in relation to minority protection. The Municipal Administrator approves the appointments and the dismissal of senior staff to ensure that they fairly reflect the proportion of qualified candidates from each community.<sup>298</sup> He may also appoint members of the Communities Committee and the Mediation Committee<sup>299</sup> who are not members of the Municipal Assembly.<sup>300</sup>

In addition to the powers of the SRSG and the Municipal Administrator, the Regulation establishes another mechanism of minority participation and protection of minority rights - the municipal committees. This may be regarded as a mechanism of municipal internal self-regulation. If the committees work well for the protection of minority interests, the interference of the Municipal Administrator and of the SRSG may be minimized.

According to section 2.1 of the Regulation, the Municipal Assembly appoints the Policy and Finance Committee, the Communities Committee and the Mediation Committee. The Communities Committee and the Mediation Committee are the core structures, which ensure that municipality's minorities (communities<sup>301</sup>) are not sidelined within the Municipal Assemblies.

The composition and powers of the Committees are designed so as to allow meaningful participation of minority communities in decision-making and coordinated action for minority protection at the municipal level. The Communities Committee

<sup>295</sup> *Ibid.*, s. 47.3.

<sup>296</sup> *Regulation on Self-government of Municipalities in Kosovo*, *supra* note 281, s. 48.1.

<sup>297</sup> *Ibid.*, s.48.14.

<sup>298</sup> *Ibid.*, s.48.12

<sup>299</sup> The two committees are entrusted with the promotion of minority participation and minority protection in a municipality. Their functions are described below.

<sup>300</sup> *Regulation on Self-government of Municipalities in Kosovo*, *supra* note 281, s. 49.1

<sup>301</sup> Interestingly, the Regulation refers not to "minorities," but to "communities." As some researchers contend, this was made to comfort Serb sensitivity over being called a minority. *Elections in Kosovo: Moving Toward Democracy?* International crisis Group Report, 7 July 2000, at 3, online: ICG Homepage < <http://www.intl-crisis->



includes both members of the Assembly and representatives of communities (at least one representative for each of the communities residing in the municipality).<sup>302</sup> Further, the community that has the majority in the municipality shall have less than one half of the membership in the Committee and the remaining membership shall “fairly reflect the number of other communities.”<sup>303</sup> The composition of the Committee is tailored with the consideration of proportionality (“fairly reflect the number of ... communities”) and grand coalition principle (at least one representative for each of the communities residing in the municipality).

As stems from the Regulation, the Communities Committee has primarily watchdog powers. It ensures that public officials do not discriminate against anyone on a ground of language, religion, ethnic origin or affiliation; that everyone enjoys equal rights and equal employment opportunities in municipal services; and that the municipal civil service has a fair proportion of candidates from different communities.<sup>304</sup> Importantly, the powers of the Communities Committee are broad enough to embrace, not only the protection of minority rights, but also the general promotion of human rights and equality. However, the powers of the Committee seem to be limited in another way.

First, the Committee can examine only actions taken “by or on behalf of the Municipal Assembly.”<sup>305</sup> This means that other instances of violations are not within the scope of the Committee’s power. Moreover, because the Regulation mentions only “actions” it is not clear whether an act adopted by the Assembly can be challenged by the Committee. Apparently, the Committee does not have authority to review the acts of the Municipal Assembly. However, it may be useful to give it a power similar to the Presidency of the Kosovo Assembly – to accept a challenge to an act and to make recommendations to the Assembly in regard to a challenged act, but to leave the power to decide on the rightfulness of such a challenge to the Assembly. Second, the Regulation does not provide standing for natural persons or even municipal officials. As stems from the provisions, the Committee initiates an examination of a particular matter on its own

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[group.org/projects/balkans/kosovo/reports/A400007\\_07072000.pdf](http://group.org/projects/balkans/kosovo/reports/A400007_07072000.pdf) > (date accessed: 15 March 2001) [hereinafter *Elections in Kosovo*].

<sup>302</sup> *Regulation on Self-government of Municipalities in Kosovo*, *supra* note 281, s.23.3

<sup>303</sup> *Ibid.*, s. 23.3

<sup>304</sup> *Ibid.*, s. 23.4

initiative. Third, if a violation occurs, the Communities Committee is not entitled to take an action itself – it has to refer the case to the Mediation Committee. Fourth, I doubt the ability of the Committee to be independent and impartial because part of its members are members of the Assembly, thus, they may be reluctant to investigate and expose to attention wrongful actions “by or on behalf of the Municipal Assembly.”

The Mediation Committee is another organ concerned with the protection of communities and its members. It consists of an equal number of the members of the Municipal Assembly who are not members of the Communities Committee and representatives of communities who do not belong to the community that forms the majority in the municipality.<sup>306</sup> As follows from the context of the Regulation, the Mediation Committee cannot bring a matter itself, but deals with the issues referred to it by the Communities Committee.

The Mediation Committee investigates the matter and tries to resolve the problem by mediation. It has to submit a report on each matter with recommendations to the Municipal Assembly. The Assembly decides what further action to take. If the Municipal Assembly does not make any decision within 21 days after the submission of the report, or if the Communities Committee is dissatisfied with the decision of the Municipal Assembly, it (the Communities Committee) may refer the matter to the Central Authority.

The municipal system of minority protection presupposes close cooperation between the Mediation Committee, the Communities Committee and the Municipal Assembly. If they function harmoniously, the whole system might work well for the protection of communities. However, this mechanism has certain drawbacks. One of them is the separation of the authority to investigate from the authority to make a final decision about the action to be taken. The Regulation creates a four-step approach to investigation and resolution of violations. Initially, the Communities Committee examines the matter and refers it to the Mediation Committee. Then, the Mediation Committee investigates the matter and tries to resolve it by mediation. If mediation fails, the Municipal Assembly has to make a decision about the further action. Next, if the Communities Committee is dissatisfied with the decision, it may refer the matter to the

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<sup>305</sup> *Ibid.*, s. 23.6

<sup>306</sup> *Regulation on Self-government of Municipalities in Kosovo*, *supra* note 281, s. 23.3

Central Authority. The loose time frame for dealing with matters (28 days for the Mediation Committee to submit a report to the Municipal Assembly and 21 days for the Municipal Assembly to decide on the action to be taken) may result in substantial delays in the resolution of urgent matters. This is particularly harmful if the Mediation Committee had failed to resolve the matter by mediation and is waiting for the Municipal Assembly's decision to proceed by other means. The above-mentioned drawbacks may limit the capabilities of the Municipal structures to deal effectively with the instances of violations. It would be advisable to establish a special procedure for dealing with matters requiring urgent resolution. It would also be helpful to create a possibility for referring the most serious cases to prosecutor or a judge for further investigation.

The Regulation left sufficient discretion for the Assemblies to establish the rules of procedure for the organs created by the Assemblies. For example, it did not set the decision-making procedures for the Communities Committee and for the Mediation Committee. As we have already seen in relation to the Kosovo Assembly, the decision-making procedure may be an important safeguard for taking into account interests of all the communities. Perhaps such delimitation was not necessary because the composition of the Committees is itself a safeguard against the domination of majority community (e.g., the Communities Committee has to have less than a half of the members of the community which forms majority in the municipality). The procedural discretion of the Municipal Assemblies opens the door for the development of their responsibility and independence. Even more importantly, the survey of the adopted approach by Municipal Assemblies will provide the UNMIK with the important feedback about the general willingness of the Assembly members to create additional guarantees for minorities where it is not legally required.

### **Interim conclusions**

There has been a gradual expansion in the role of local political forces and communities from mere consultation with the UNMIK to independent exercise of administrative functions. This process evidences the realization of the principal goals of peace-building. With the adoption of the Regulation of Self-Government of Municipalities in Kosovo, municipalities obtained sufficient powers to administer

municipal affairs. After the implementation of the Framework, organs of self-government will also be established at the provincial level.

While elected organs have primary responsibility for the administration in assigned areas, the international administration retains the power to control and supervise them. The SRSG can exercise control over self-government through his dormant powers. Some of these dormant powers can be exercised without seeming restrictive (for example, the SRSG can issue administrative directions to Municipal Assemblies or take measures to ensure that the needs of a village or settlement are properly addressed, or decide whether measures sufficiently take into account the interests of minorities). Such an extensive power may become an impediment to the development of independent self-government in Kosovo and may violate the provisions of the peace-building concept.

The system of local organs and the supervision of the international administration has to be flexible enough to allow for the development of self-government. The challenge for the future is to determine the extent to which international bodies can and should continue to intervene in local administration after all representative bodies start functioning. It is necessary to carefully balance the need to control self-government in Kosovo and the need to develop responsible local organs. Theoretically, any activity should be measured by its potential to advance the goals of peace-building – transformation and sustainability. After the election of the Kosovar organs on both municipal and provincial level, the basic process of transformation may be considered completed. After that, the focus has to be shifted to the development of sustainability, that is, to the development of independent and responsible self-government. The latter goal should serve as a guideline for making a decision about the interference of the SRSG in the activities of self-government.

In terms of the implementation of the consociational techniques, the JIAS more followed the existing political trends and was more guided by the expediency requirement. For example, more powers were given to the “elite club” of the IAC rather than to the KTC because it was easier to reach key decisions with the several major Kosovar leaders. The legal framework for permanent self-government seeks to reflect more fully the principles necessary for inclusive government. The plans include quite extensive implementation of consociationalist techniques, such as proportionality and

mutual veto, at the provincial level. For example, the adoption of laws in the Kosovo Assembly allows for some kind of post facto moderate mutual veto. The composition of the representative organs and organs created by the Kosovo and the Municipal Assemblies follow the proportionality principle.

At the municipal level the principles of consociationalism are incorporated in a very limited way. The decision-making procedures of the Municipal Assemblies do not include any mutual veto type techniques. The composition of the municipal committees follows the principle of proportionality, but this is not enough for the protection of minority interests. Similar unequal implementation of consociationalism at the provincial and municipal level was observed in relation to the UNMIK-created organs. This may evidence a general tendency of the UNMIK to pay more attention to the provincial rather than the municipal structure. If this is true, such an imbalance may have an adverse effect on the democratization of Kosovo.

The inclusive effect of the rules regulating competencies and functioning of both municipal and provincial self-government depends not only on the extent to which these rules incorporate the requirements of consociationalism, but also on the “human element” in the representative organs. Individual positions and the perceptions of the assembly members will have a great impact on the atmosphere in the organs of self-government. The tool that can be used to influence the “human side” of representative organs is the rules of electoral campaigning and conduct. They are like a filter, which reduces the number of radical nationalist elements in representative bodies and creates preconditions for more cooperative organs of self-government. The section that follows discusses the regulation of the electoral process in Kosovo.

## **C. Elections in Kosovo**

### **1. Municipal elections**

#### *a. Organizational framework for elections*

While the UNMIK-created organs are important for immediate involvement of local political forces in decision-making, elections are a fundamental step in the development of the Kosovo self-government.

The preparation and conduct of elections was a joint effort of the UNMIK pillars. Although the OSCE was assigned a leading role in the electoral preparation,<sup>307</sup> other international organizations were also involved in one or another stage of this process.

The cooperation among organizations acquired different forms. The UN Civil Administration set up the basic rules for elections and participated in the civil registration. The KFOR provided secure environment for the OMIK personnel and voters during the polling.<sup>308</sup> The International Organization for Migration (IOM) assisted the OSCE in civil registration of the applicants from outside Kosovo.

The complex process for the organization of elections involves several core activities: 1) creation of basic electoral rules – was provided by the SRSG; 2) technical preparation of elections – civil registration, setting up polling stations, media campaign, etc. – was carried out by the OSCE, IOM, the Civil Administration pillar and Municipal Election Commissions (MEC);<sup>309</sup> 3) supervision of compliance with electoral rules – was exercised by two independent bodies – the Central Election Commission (CEC) and the

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<sup>307</sup> This task is carried out through an appropriate organizational structure – the OSCE mission in Kosovo (OMIK). The OMIK was established by a decision of the OSCE Permanent Council with the purpose to “take the leading role in matters relating to institution- and democracy-building and human rights.” To fulfill its mandate the Mission has set up five departments: Police Training and Education, Democratization, Human Rights and Rule of Law, Media Affairs and Elections.

<sup>308</sup> The OSCE and KFOR have concluded three agreements regulating their cooperation during the 2000 municipal elections: the Technical Agreement between the KFOR and the OSCE, the General Arrangement and the Local Arrangements for the Exchange of Information. The Technical Agreement between the OSCE and the J8 branch of KFOR sets up financial procedures regarding KFOR support. It defines that the OSCE will seek KFOR support only in regard to mission essential tasks and lists the services, which may be provided to the OSCE pending subsequent reimbursement. The General Arrangement between the KFOR and the OSCE provides further details about the responsibilities of each of the parties. The arrangement affirms the importance of successful elections and the necessity to establish procedures for close cooperation between the OSCE and KFOR, “with the aim of creating optimal conditions for municipal elections.” Cooperation between the structures is to be exercised, *inter alia*, through the OSCE/KFOR Joint Elections Operations Center (JEOC). While the OSCE is wholly responsible for the organization and preparation of elections, KFOR undertakes to provide a “safe and secure environment and freedom of movement for OSCE ...and the UNMIK personnel and voters in close coordination with UNMIK police.” The Local Arrangements for the Exchange of Information between KFOR and OSCE regulate the release of information between the two organizations.

<sup>309</sup> The Municipal elections Commission (MEC) carried out election administration at the municipal level. The responsibilities of MEC included providing information to voters and parties, coalitions and candidates concerning the elections, assisting in the technical arrangements at the Polling Stations, ensuring proper counting and compiling the electoral results. For details, see Electoral Rule 2000/4, online: OSCE Homepage .

Electoral Complaints and Appeals sub-Commission (ECAC). While each of these activities represents an interesting topic for a scholarly discussion, this thesis is primarily interested in the content of the electoral rules and their enforcement.<sup>310</sup>

### *b. Legal rules*

The regulation of the 2000 municipal elections was based on two sets of legal rules: Regulations issued by the UNMIK and Electoral Rules issued by the CEC within the powers delegated to it by the UNMIK. The UNMIK-created law on preparation and conduct of elections includes five core Regulations: Regulation 2000/45 On Self-government in Municipalities in Kosovo, Regulation 2000/39 On the Municipal Elections in Kosovo, Regulation 2000/21 On the Establishment of the Central Election Commission, Regulation 2000/13 On the Central Civil Registry, and Regulation 2000/16 on the Registration of Political Parties in Kosovo. These Regulations set up the foundations for the administration and supervision of the electoral process. In particular, they defined the powers of municipalities and their representative organs; set up the electoral system; and authorized the establishment of the CEC.

The rules issued by the CEC concern the procedural side of elections, such as certification of political parties and coalitions; appeals and complaints procedures; voter registration; registration of candidates, etc.

### *c. Electoral system*

UNMIK Regulation 2000/39 defined that the municipal elections were to be held according to the proportional system of voting with an “open” ballot (both party names and names of candidates appear on the ballot).<sup>311</sup> Initially, “open” list was not favoured by international officials because it is more difficult to administer.<sup>312</sup> However, the “open” ballot was ultimately adopted because it provides a voter with more information

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<sup>310</sup> Please, note that the first part of this section is devoted to the analysis of the 2000 municipal elections only. A brief overview of the electoral rules for the all-Kosovo elections is to follow.

<sup>311</sup> *Regulation on the Municipal Elections in Kosovo*, UNMIK/REG/2000/39, online: United Nations Homepage < <http://www.un.org/peace/kosovo/pages/regulations/reg039.html> > (date accessed: 5 June 2001).

<sup>312</sup> *Elections in Kosovo*, *supra* note 300 at 4.

about a party and candidates, thus, giving a voter an opportunity to make a more conscious choice.

The proportionate system is one of the components of the consociational system and a reflection of the principle of proportionality. Theoretically, it is the most suitable for ethnically divided societies. It affords each ethnic group a vote proportional to their weight in the total population<sup>313</sup> (assuming that those ethnic groups have political formations, which represent them). The proportional system allows small parties (minority parties) to gain access to municipal councils even without getting a large number of votes. It was also contended that this was the only electoral system that could be applied on the basis of the existing municipal boundaries.<sup>314</sup>

At the same time, critics suggest that such a system can be toothless against majority rule. "Where parties are ethnically based, ... list PR is perfectly compatible with the domination of some groups by others."<sup>315</sup> A proportionate electoral system usually does not provide incentives to create grand coalitions as opposed to majority coalitions.<sup>316</sup> This effect is also true for Kosovo. As we will see in more detail in section D of this Chapter, Albanian parties won an overwhelming majority of votes in the 2000 municipal elections. No inter-ethnic pre-electoral coalitions were formed. Still, the proportionate system allowed several minority parties to get seats in a few municipalities with significant concentration of particular minorities (for example, in Dragas, Kosovo Polje, Prizren). Unless electoral regulations contain special requirements stimulating the formation of inter-ethnic coalitions (and the mentioned UNMIK Regulation did not), the proportionate system as such does not promote inter-ethnic dialogue and reconciliation. The major positive effect that the proportionate system may have is to secure (under favourable circumstances of active participation of minority voters and parties in the elections and high concentration of a particular minority in a certain district) a certain number of elected representatives for each segment of the society. For Kosovo the proportionate system was important in two respects: 1) to guarantee at least the minimal possibility for minority parties to obtain seats in the local legislature; 2) to create

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<sup>313</sup> Barnes, *supra* note 28 at 95.

<sup>314</sup> OSCE Press Release, "SRSG Signs Municipal Electoral Law," 10 July 2000.

<sup>315</sup> Horowitz, *supra* note 33 at 258.

<sup>316</sup> *Ibid.*



preconditions for less interference by the SRSG in co-option of minority members. In fact, in at least one municipality – Dragas, Decani, Malishevo – the proportionate system achieved the desired effect. It provided for the election of a sufficient number of minority representatives so that no co-option by the SRSG was necessary.

*d. Norm-creation: the CEC*

The CEC was established by Regulation 2000/21 as an independent and impartial body,<sup>317</sup> “responsible for the conduct of elections in Kosovo.”<sup>318</sup>

The SRSG assigned the CEC with competence in two major areas. First, preparation of basic electoral rules governing the conduct of elections. The basic rules concern the term of office of elected officials, the selection of the electoral system, the authority of the SRSG to certify the registration process and the final results of the elections. These rules are prepared by the CEC, but have to be promulgated by the SRSG as regulations.<sup>319</sup>

The second area of CEC responsibilities includes the preparation and issuance of electoral rules for implementation of the electoral rules promulgated by the SRSG. These rules regulate the procedural aspects of elections, such as polling, voter registration, party registration, electoral conduct, etc. They do not require promulgation by the SRSG. However, the SRSG has authority under SCR 1244 to suspend or revoke any of these rules or decisions.<sup>320</sup>

The Regulation adheres to the “tradition” of mixed Kosovar-international membership. The CEC consists of nine Kosovars and three international members. The Kosovar members include the representatives from the LDK, the PDK and the LBD<sup>321</sup> as well as representatives of media, NGOs, Slavic Muslim and Turkish communities. The place was also reserved for Serbs, but they chose not to participate.

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<sup>317</sup> *Regulation on the Establishment of the Central Election Commission*, UNMIK/REG/2000/21, s. 1, online: United Nations Homepage <<http://www.un.org/peace/kosovo/pages/regulations/reg021.html>> (date accessed: 7 May 2001).

<sup>318</sup> *Ibid.*, s. 4.1.

<sup>319</sup> *Ibid.*, s. 4.2.

<sup>320</sup> *Ibid.*, s. 4.4.

<sup>321</sup> The OSCE required all political party representatives to resign all their leadership positions, but they could retain party membership.

The Regulation on the Establishment of the CEC does not spell out the powers of the CEC in great detail. It only distinguishes the areas regulated by the basis rules and those governed by the rules of the CEC. The CEC has used its power to issue Electoral Rules in order to develop its own powers. In particular, it has established its authority to appoint and remove members of MECs and the ECAC;<sup>322</sup> to certify the eligibility of parties, coalitions, citizens' initiatives and independent candidates to participate in elections;<sup>323</sup> to accredit elections observers;<sup>324</sup> and to review applications for candidate registration.<sup>325</sup> In general, the powers of the CEC may be characterized as combining the primarily norm-creative function with the responsibility for the general electoral supervision.

#### *e. Electoral Rules*

The CEC adopted 14 Electoral Rules that regulate various aspects of the municipal elections. Rule 1 contains the Code of Conduct for Political Parties, Coalitions, Citizens' Initiatives, Candidates, and Their Supporters.<sup>326</sup> Rules 2 and 4 established the ECAC and MECs accordingly. The other eleven rules focus on the certification of parties, coalitions, independent candidates and citizens' initiatives; voter registration appeals; voter information; election observers; registration of candidates; voters' lists confirmation; conduct of media during elections; finance disclosure of the parties; polling and counting of ballots.

Although the regulation of every aspect of the electoral process is important, particular attention should be paid to regulation of the conduct of political organizations contesting the elections. Their conduct and pre-electoral tactics have a crucial impact on

<sup>322</sup> Electoral Rule 4 & 2, online: OSCE Homepage <http://www.osce.org/elections/electoralrules.php3?rule=2> (date accessed: 10 May 2001).

<sup>323</sup> Electoral Rule 3, online: OSCE Homepage <http://www.osce.org/elections/electoralrules.php3?rule=2> (date accessed: 10 May 2001).

<sup>324</sup> Electoral Rule 8, online: OSCE Homepage <http://www.osce.org/elections/electoralrules.php3?rule=2> (date accessed: 10 May 2001).

<sup>325</sup> Electoral Rule 9, online: OSCE Homepage <http://www.osce.org/elections/electoralrules.php3?rule=2> (date accessed: 10 May 2001).

<sup>326</sup> *The Code of Conduct for political parties, coalitions, citizens' initiatives, independent candidates, their supporters and candidates*, CEC/Electoral Rule 1/2000, online: OSCE Homepage [hereinafter *Code of Conduct*].

the general stability of the electoral campaign and the electoral results. As we have noted before, ethnic parties have a tendency to exploit ethnic sentiment (inter alia, through making nationalistic statements and otherwise inciting inter-ethnic hatred) in their electoral campaigns. The use of such methods of campaigning can, first, have a destabilizing effect on the interethnic relations, and, second, help radical nationalist parties to legitimately win seats in the legislature. These potential dangers can be minimized through appropriate electoral regulation. The supervision of the activities of political organizations can be exercised at several levels: 1) when a party seeks to enter the political arena – through registration and certification of parties; 2) during the electoral campaign – through establishment of binding rules of electoral conduct and organs for their enforcement; 3) after the elections – through financial disclosure of the expenses on the electoral campaign. Each of the three procedures is intended to monitor the activities of parties and to prevent them from exploiting ethnic sentiment and other inappropriate techniques in their electoral campaigns. In turn, this monitoring creates the foundations for more peaceful electoral processes and potentially more tolerant and cooperative representative bodies.

*i. Pre-electoral regulation: Certification and registration of parties, coalitions, independent candidates or citizens' initiatives*

According to the existing rules and regulations, the “admissibility” of a political party to participate in elections in Kosovo is conditioned on fulfillment of two requirements: registration and certification. Registration is exercised according to UNMIK Regulation 2000/16 On the Registration and Operation of Political Parties in Kosovo.<sup>327</sup>

Registration allows the exercise of the initial control over a party. One of the central aims of such control is to prevent the legitimization of openly nationalist parties. This control is exercised, inter alia, through verification of the content of a party's statute and political programme.

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<sup>327</sup> Please note that registration is required for political parties only, while certification is mandatory for parties, coalitions, citizens' initiatives and independent candidates.

The Regulation requires that the political objectives of the party “specifically include a commitment to democratic principles and the protection and promotion of human rights as well as an affirmation of respect, tolerance and understanding for all, irrespective of their ethnicity.”<sup>328</sup> If a party’s statute and programme is inconsistent with the UNMIK Regulations and the applicable law, registration is denied. Registration can also be denied if the name of the party may incite hatred or violence or if a party violates a prohibition that individuals indicted by the ICTY or any other war-crime tribunal cannot hold any elective position in a party.<sup>329</sup> However, to date there is no information that a party has been denied registration on such a ground. A party may also be sanctioned by suspension or revocation of registration if it violates Regulation 2000/16 during the exercise of its activities.<sup>330</sup>

Another part of the pre-electoral monitoring is certification of parties, coalitions, independent candidates and citizens’ initiatives. To participate in elections a party, coalition, independent candidate or citizens’ initiative has to certify its eligibility with the CEC. A necessary part of the application for certification is a statement of a party, coalition, or citizens’ initiative or an independent candidate that they abide by the Electoral Rules, applicable Regulations and Directions and Procedures.<sup>331</sup> This statement is an express proof of a party’s obligation to honour the rules of the Code of Conduct. As we will see below, the ECAC often referred to these statements in its decisions.

## *ii. Regulation of the electoral conduct*

### **The Code of Conduct**

The Code of Conduct for Political Parties, Coalitions, Candidates and Their Supporters can be regarded as the central means for the regulation of the behaviour during the electoral campaign. The Code sets up major affirmative standards of the electoral campaign and the limits of admissible electoral conduct. The Code is binding on all the parties, coalitions, citizens’ initiatives, candidates, and their supporters.

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<sup>328</sup> Regulation on the Registration and Operation of Political Parties in Kosovo, UNMIK/REG/2000/16, s. 2.2 (e), online: United Nations Homepage <<http://www.un.org/peace/kosovo/pages/regulations/reg016.html>> (date accessed: 9 May 2001).

<sup>329</sup> *Ibid.*,

<sup>330</sup> *Ibid.*,

<sup>331</sup> Electoral Rule 2, *supra* note 321, s. 3.35

The Code affirms two of the most important means of electoral campaigning: the right of the parties<sup>332</sup> to hold large public meetings and the right to publish and distribute placards, posters and other materials for the purposes of parties' electoral campaigns. Importantly, political organizations do not need a permit to hold public meetings. However, in order to reduce the risk of disturbances of public law and order during such rallies, the Rule requires the organizers to give a notification to the International Civilian Police (ICP) at least four days prior to the event.<sup>333</sup>

The Code defines actions prohibited during the electoral process. The majority of these prohibitions seek to prevent the promotion of ethnic hatred, violence and voter manipulation. In particular, it is prohibited to disturb gatherings of other political parties; carry and display weapons at political meetings; destroy placards and other materials used by other parties in their political campaign; use language that can provoke violence or spread hatred, etc.<sup>334</sup> The Code specifically outlaws intimidation and the use of violence during the electoral process.<sup>335</sup>

Additional restrictions on electoral activities are imposed during 24 hours prior to polling. The Code prohibits holding meetings, presenting any materials at polling stations, use of public address systems and other means that may influence the voters' choice.

The Code is only a part of the control mechanism over the electoral conduct. It sets the norms of admissible behaviour, but does not contain any sanctions for violations of its provisions. The Code's standards of behaviour are complemented by enforcement mechanisms described below.

### **Enforcement of electoral rules: the ECAC**

Proper election supervision requires rules and an enforcement mechanism to ensure that parties comply with those rules.<sup>336</sup> Enforcement can be exercised in several

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<sup>332</sup> For more convenience I will use the term "parties" instead of "parties, coalitions, citizens' initiatives, and independent candidates."

<sup>333</sup> Electoral Rule 2, *supra* note 321.

<sup>334</sup> *Ibid.*, s. 1.10.

<sup>335</sup> *Ibid.*

<sup>336</sup> Daniel Bessington, "From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina" 12 Am U Int'l L. Rev. 553 at 557.

ways - either by the political authority itself, like the UN, on an ad hoc basis or by a special enforcement body created for that purpose.<sup>337</sup>

In Kosovo, the main role in the enforcement of electoral rules was assigned to the Electoral Complaints and Appeals sub-Commission (ECAC). The ECAC was established by the CEC Electoral Rule 2 in May 2000.<sup>338</sup> The mandate of the ECAC includes “adjudicating all complaints concerning the electoral process as established in all applicable Regulations, Administrative Directions and Electoral Rules”<sup>339</sup> and adjudicating appeals on decisions of the Joint Registration Taskforce concerning voter registration.<sup>340</sup> The ECAC issues decisions and advisory opinions.

Special procedures ensure that the hearing of complaints is conducted fairly and in a timely manner. The ECAC can exercise its power only if a complaint is admissible. A complaint must be submitted by a person who has a legal interest or who claims that his rights were violated. It must be submitted no later than three days after the violation has occurred or become known. The ECAC shall refuse to adjudicate a manifestly ill-founded complaint.<sup>341</sup>

The Rule restricts the standing to individuals who have a legal interest, or whose rights have been violated. This requirement has a well-founded practical justification – to prevent overloading the Sub-commission with complaints. At the same time, this restriction may have an adverse effect on the protection of electoral rights. Many individuals may fear lodging complaints or may merely be unaware of this right. It would be advisable to allow the UN and the OSCE officials and electoral observers to bring electoral complaints because they are competent enough to realize when a violation has occurred and to take appropriate legal action to correct that violation.

Besides the power to hear complaints and appeals, the ECAC has enough coercive power to “stimulate” parties to comply with the Electoral Rules. The CEC authorized the ECAC to impose penalties on parties, coalitions, citizens’ initiatives and independent

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<sup>337</sup> Blessington, *supra* note 336 at 643.

<sup>338</sup> Regulation 2000/12 on the Establishment of the CEC expressly provided for the authority of the CEC to create an electoral complaints body. S. 4.3(i).

<sup>339</sup> Electoral Rule 2, *supra* note 321, s. 2.0 (a).

<sup>340</sup> *Ibid.*, s. 2.25 (a).

<sup>341</sup> Note, that the Regulation does not clarify what complaint may be regarded as “manifestly ill-founded.”

candidates. Electoral Rule 2 prescribes two types of sanctions that can be imposed for violation of Electoral Rules. The first group includes a remedial correction action and fines up to 10 000 DM.<sup>342</sup> These sanctions are intended for less serious violations of electoral conduct and can be imposed by the ECAC alone. The other group is comprised of more severe penalties: removal of members of a MEC, Confirmation Centre Staff or members of the Polling Station Committee; removal of candidates from the candidate's list; removal of candidates from party lists without the possibility for a party to replace him;<sup>343</sup> exclusion of a party, coalition, independent candidate or citizens' initiative from running in the elections; exclusion of a candidate or party, coalition, independent candidate or citizens' initiative from taking part in the elections for up to six years.<sup>344</sup> These penalties may be imposed by the ECAC only after the approval of the Chairman of the CEC in consultation with the CEC.<sup>345</sup>

The procedure concerning electoral appeals is similar to the procedure with electoral complaints described above. Appeals can be submitted by an individual who has a legal interest or who claims that his rights have been violated. The appeal has to be submitted within three days after the decision of the Joint Registration Taskforce has been communicated to a person.<sup>346</sup> An applicant has to exhaust all administrative means before filing an appeal with the ECAC.

According to Electoral Rules 5 and 7, the ECAC has the authority to include an applicant's name in the Voters' List if the ECAC finds that a voter meets the eligibility requirements. The ECAC can also impose all the above-mentioned penalties on individuals responsible for registration violations. Decisions on electoral appeals are final and binding.

The ECAC occupies a special position in relation to the CEC. In terms of competence, the CEC and the ECAC are established as separate bodies with distinct functions and powers. In particular, the ECAC cannot adjudicate complaints on the

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<sup>342</sup> Electoral Rule 2, *supra* note 321, s. 2.20(a).

<sup>343</sup> The ECAC usually does not indicate a particular candidate that has to be stricken. This decision is left for the party. However, the electoral rules impose a certain restraint on such decision: a female candidate cannot be stricken from the list.

<sup>344</sup> Electoral Rule 2, *supra* note 321, s. 2.20(b).

<sup>345</sup> *Ibid.*

<sup>346</sup> *Ibid.*, s. 2.25 (b).

decisions of the CEC.<sup>347</sup> The decisions of the ECAC cannot be appealed to the CEC.<sup>348</sup> However, in certain respects the ECAC is subordinated to the CEC. The Chairman of the CEC appoints the members of the ECAC.<sup>349</sup> The CEC decides on the term of the ECAC's mandate. The sub-commission has to report to the Chairman of the CEC.<sup>350</sup>

The ECAC is a quasi-judicial body. Similarly to judicial bodies, the ECAC has established and affirmed its authority through its decisions. For example, in Advisory Opinion No.1, the ECAC affirmed its power to penalize parties, coalitions, independent candidates and citizens' initiatives for violations of applicable laws, regulations and rules. It also stated that the ECAC's powers to investigate and punish violations will continue through Election Day. The ECAC will remain in operation, enjoying its full powers until all complaints are resolved and the ECAC's "job is complete."<sup>351</sup>

The ECAC has also assumed the power to interpret the Electoral Rules. In Advisory Opinion No.2, it decided whether mosques and churches are public buildings within the meaning of Electoral Rule 2000/1 sec. 1.10.2.<sup>352</sup> The ECAC held that the communal use of mosques and churches gives these places a public character. Thus, mosques and churches are public buildings within the meaning of the Electoral Rule and placing posters or other signs related to the election campaign on them will constitute a violation of those rules.

The ECAC has issued decisions on a variety of violations of electoral rules. These decisions may be roughly categorized according to the issues that they addressed: 1) notification about public meetings; 2) incitement of violence; 3) display of weapons; and 4) inappropriate behaviour of political parties and their supporters.

### *1) Notification about public meetings*

The ECAC has adjudicated several cases concerning notification about electoral rallies, including three similar cases involving the LDK, the PDK and the AAK.

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<sup>347</sup> Electoral Rule 2, *supra* note 321.

<sup>348</sup> *Ibid.*

<sup>349</sup> *ibid.*

<sup>350</sup> *Ibid.*, s. 2.0 (e).

<sup>351</sup> Advisory Opinion No.1, online: OSCE Homepage <  
<http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=5> > (date accessed: 29 May 2001).



According to section 1.5 (b) of the Code of Conduct, parties have to notify the ICP about their public meetings/events at least four days in advance. The ECAC has emphasized that, according to s. 3.35(a), of the Electoral Rule on the certification of political parties, coalitions, citizens' initiatives and independent candidates parties signed a statement that they will abide the Electoral Rules and all applicable regulations.<sup>353</sup> Following the principle that punishment has to be commensurate with the gravity of offence, the ECAC distinguished the failure to give proper notification about political rally (i.e., notify the ICP about a meeting no less than four days in advance) and the failure to give any notification at all. Parties that failed to properly notify the ICP about meetings were fined 250 DM per meeting. Parties that gave no notification at all were fined 500 DM per meeting.

The decisions of the ECAC included an "incentive" for parties to pay fines without delay: if fines were not paid by the deadline, the ECAC reserved a right to recommend the removal of one candidate from the candidate's list.

## 2) *Incitement of violence*

The international organizations working in Kosovo reported numerous acts of violence and intimidation during the electoral campaign. Intimidation took varying forms, from threats to physical abuse.

The ECAC heard a case concerning verbal threats and incitement of violence against the LDK.<sup>354</sup> The complaint concerned the statements by the vice-president of the PDK - Skenderbe Hebib. He was reported to declare on at least three occasions that the PDK would not allow the LDK to win the elections and that even if the LDK wins, the PDK would not allow it to take seats and would resort to violence, if necessary.

Given its authority under Electoral Rule 2, the ECAC summoned Mr Hebib for a hearing to comment on the accusations. Mr Hebib declared that he had never made such

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<sup>352</sup> The provision prohibits display of notices, placards or names and slogans relating to the election campaign in or on public buildings.

<sup>353</sup> See, section C(1(e)) of this Chapter.

<sup>354</sup> Case No. 2000/035, online: OSCE Homepage [www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0](http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0) (date accessed: 10 June 2001).

statements and that his party will fully support the implementation of the electoral results, regardless of their outcome for the PDK.

The ECAC did not find evidence to prove the accusations. In order to clarify any doubts in regard to Mr Hebibi's political intentions, the sub-Commission obliged him to make a public statement that he denounces violence, supports peaceful electoral campaign and the outcome of the elections.

Although the ECAC's decision did not result in any severe punishment, it demonstrated that the Sub-commission would monitor and investigate cases of speech inciting violence. It was also important that the ECAC obliged an alleged violator to make a public statement about the denunciation of violence and support for the results of the elections, regardless of their outcome for the PDK. No matter how formal such statements are, they help to create a certain attitude<sup>355</sup> in regard to the elections among party supporters and the electorate in general.

### 3) *Display of weapons*

Carrying and displaying weapons at political meetings was another concern during the electoral campaign. The ECAC examined a complaint on the PDK rally in Glogovac, where the PDK supporters carried guns and fired them into the air.<sup>356</sup> The Code of Conduct specifically prohibits carrying and displaying weapons at public meetings.<sup>357</sup> Moreover, it obliges political parties to ensure that their supporters abide by the Code of Conduct.<sup>358</sup> The sub-Commission stressed its disapproval of the presence of weapons at political events and declared that it will not hesitate to move against any party that fails to comply with Electoral Rules.<sup>359</sup> The PDK was found responsible for the actions of its supporters and was fined 1 000DM for violation of the Code of Conduct.

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<sup>355</sup> By "certain attitude" I mean commitment to support the certified electoral results and their implementation and awareness of what conduct is admissible. The position that a party takes in relation to these issues in many respects defines the behaviour of its supporters.

<sup>356</sup> Case No. 2000/030, online: OSCE Homepage [www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0](http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0) (date accessed: 10 June 2001).

<sup>357</sup> *Code of Conduct*, *supra* note 325, s.3.2.

<sup>358</sup> *Ibid.*, s.1.

<sup>359</sup> Judgment in the Matter of a campaign held by the PDK in Glogovac, 26 September 2000, ME 2000/030, online: OSCE Homepage <http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=3>

#### 4) *Inappropriate behaviour of party supporters*

Many electoral complaints concerned inappropriate behaviour by the supporters of political parties. Such behaviour, for example, included disruption of the rallies of political opponents, display of graffiti and placards on public buildings, participation of members of Kosovo Corps in political meetings, etc.

One of the cases decided by the ECAC concerned the disruption of the LDK rally by PDK supporters in Lipjan.<sup>360</sup> The actions of the interveners included chanting “Thaci Thaci”, throwing eggs at the LDK candidates and supporters and physical abuse. Having examined the photographic and video evidence, the ECAC concluded that the disruption was planned and organized beforehand. The actions of the PDK supporters prevented the LDK from the exercise of its right to “organize and hold large public meetings/events in which they [parties] can freely express their positions in order to gain support from the voters.”<sup>361</sup> Further, the actions of the LDK supporters involved violence, which is strictly prohibited during the election campaign.

Notwithstanding the PDK’s responsibility to ensure that their supporters abide the Code of Conduct, the party not only did not stop the actions of its supporters, but encouraged the escalation of the situation.<sup>362</sup> The ECAC found the PDK to be in violation of s. 1.0,<sup>363</sup> 1.10 (4)<sup>364</sup> and 1.13 (a)<sup>365</sup> of the Code of Conduct and penalized the PDK by striking one candidate from the PDK list in Lipjan.

Similar clashes between the LDK and the PDK supporters occurred in Suva Reka.<sup>366</sup> Although the LDK supporters provoked the incident, both sides resorted to verbal confrontation, followed by physical abuse. Again, the ECAC referred to the prohibition to disturb gatherings of other political parties and prohibition of violence during the electoral process. The sub-Commission found that both the PDK and the LDK

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<sup>360</sup> Judgment in the Matter of a rally disruption in Lipjan, case No. 2000/037, 25 September 2000, OSCE Homepage <http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0>

<sup>361</sup> *Code of Conduct*, *supra* note 325, s. 1.5 (a).

<sup>362</sup> Judgment in the Matter of a rally disruption in Lipjan, *supra* note 359.

<sup>363</sup> The responsibility of parties to ensure that their supporters abide by the Code of Conduct.

<sup>364</sup> Prohibition to disturb gatherings of the other parties.

<sup>365</sup> Prohibition of violence and intimidation during the electoral campaign.

<sup>366</sup> Judgment in the Matter of a rally disruption in Suva Reka, case No. 2000/043, 22 September 2000, online: OSCE Homepage <http://www.osce.org/kosovo/elections/ecacdecisions-e.php3?n=0>

supporters violated these rules. Since the parties failed to ensure that their supporters observe the Code of Conduct, both were penalized. The LDK, whose supporters provoked the incident, was fined 1 000 DM. The PDK, whose supporters responded to the provocation, received a warning.

### *iii. Post-electoral regulation*

The means of post-electoral control over party conduct include the requirements on financial disclosure of party's income and campaign expenditures. According to Electoral Rule 2000/12,<sup>367</sup> all parties, coalitions, independent candidates and citizens' initiatives that were certified to participate in elections have to file with the CEC two financial reports: financial disclosure report, showing all income received and payments made and a campaign expenditures report. The financial disclosure report is filed twice: prior to elections and 30 days after the electoral results have been certified. The campaign spending disclosure report is submitted to the CEC 30 days after the certification of the electoral results. The campaign spending limit is established at a maximum of one Deutsche Mark per registered voter in each municipality where as party stands for elections.<sup>368</sup> If either report is not completed in a satisfactory manner, the CEC can refer the party, coalition, independent candidate or citizens' initiative to the ECAC for appropriate action.<sup>369</sup>

The requirements of financial disclosure are an important means to control the sources of party's income and spending. The spending limits put parties on fairly equal footing in terms of the scope of their electoral campaigns. Unfortunately, the enforcement of the expenditure requirements seems to be somewhat incomplete. As appears from the Electoral Rule, the only possible action against violation of financial requirements is to refer the case of incomplete report to the ECAC "for appropriate action." The wording of the Rule suggests that punishment is imposed for non-compliance with procedural requirements of reporting rather than for the very violation of expenditure limits and admissible sources of financing. The Rule also does not define what "appropriate action"

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<sup>367</sup> Electoral Rule 12, online: OSCE Homepage <  
[www.osce.org/kosovo/elections/electoralrules.php3??rule=12](http://www.osce.org/kosovo/elections/electoralrules.php3??rule=12) > (date accessed: 26 May 2001), s.

<sup>368</sup> *Ibid.*, s. 12.5

<sup>369</sup> *Ibid.*, s. 12.0 & s. 12.10.

the ECAC may take. Nor does the Electoral Rule on the Establishment of the ECAC give details about penalizing parties for non-compliance for the disclosure procedures. The lack of guidance in this area leaves unclear the means available the ECAC to control party's compliance with financial requirements.

### **Interim Conclusion**

To sum up, the ECAC addressed the most typical violations during the electoral campaign: disturbing political meetings, incitement of violence, display of weapons at political meetings, etc. In its judgements, it did not apply the stiffest penalties, like prohibiting participation of a candidate or a party from running in elections. On several occasions it struck a candidate from the party list, but in the majority of cases fines were imposed. Moreover, in relation to the least serious violations (e.g., non-compliance with the requirements of proper notification about their public meetings), the ECAC issued a party with a warning and only repetitive violation of the rule led to imposition of stricter sanctions.

The practice of the ECAC reveals several common features in the policy of enforcing electoral rules. First, the ECAC strictly observed the principle that a penalty has to be commensurate with the gravity of offense. Because the majority of the cases heard by the ECAC did not involve particularly grave violations of electoral conduct, it did not need to resort to the strictest penalties. In this respect, the ECAC managed to balance the enforcement and the goal to proceed with elections.<sup>370</sup>

Second, the ECAC penalized parties for the actions of party supporters. This measure prevented Kosovo parties from using the tactics which they otherwise would have adopted: to act through their supporters and thereby escape being immediately responsible and penalized for the destructive actions.

Third, the ECAC had to provide for special guarantees that a violator will comply with an ordered action. In many decisions the sub-Commission reserved the right to recommend striking a candidate from the candidates' list if a party does not pay an ordered fine on time.

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<sup>370</sup> Enforcement of electoral rule is a balancing act: "rough justice" may lead to boycott of the elections; weak regulation may encourage violation of rules.

In general, although the ECAC cannot be regarded as a too interventionist enforcement body, its decisions created necessary “incentives” for the parties to be more careful about the methods to promote their electoral campaigns. In turn, these “incentives” contributed to fairer and more peaceful competition among parties.

The ECAC’s work did not represent an immediate instance of the implementation of consociationalism. It was created to ensure the compliance of political entities and public officials with the rules of electoral conduct and procedure rather than to facilitate the inclusiveness of minorities in the government. Moreover, by the criteria of composition and decision-making procedure, the ECAC cannot be regarded as a consociational body. The Electoral Rule on the Establishment of the ECAC does not require proportional representation of the major segments of the Kosovo society in the sub-Commission. Perhaps no proportionality could be introduced because of the small number of members on the ECAC – three national commissioners and an International Chief Commissioner.<sup>371</sup> At the same time, given the ethnically sensitive character of many violations, the diversity in representation on the ECAC is important for fairer decision-making. The decision-making procedure of the ECAC reflects two extremes – mutual veto or unilateral dictatorship of the Chief Commissioner: decisions have to be adopted by consensus, but if no consensus can be reached, the Chief Commissioner “shall decide.”<sup>372</sup>

The absence of an expressly consociational character in the ECAC does not mean that this body has failed to contribute to the broader process of Kosovo democratization. To the contrary, many aspects of the ECAC’s activities may be regarded as creating a generally more favourable climate for the implementation of the consociational techniques. For example, the requirement of stricter compliance with electoral rules will motivate parties to look for cooperative ways of winning elections. Instead of relying on speculation over ethnic sentiment, or using officials to manipulate the elections, parties will have to look for other means to embrace larger numbers of the electorate. In particular, they may choose moderating their positions on ethnic issues and creating multi-ethnic coalitions.

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<sup>371</sup> Electoral Rule 2, *supra* note 321, s. 2.5.

<sup>372</sup> *Ibid.*, s. 2.15.

The instance of the ECAC's work demonstrates that democracy in an ethnically divided society can be developed through a variety of means, both those that directly contribute to inclusiveness and those which have an indirect impact on the formation of consociational government. Moreover, not all the organs have to be composed consociationally in order to be able to contribute to the development of consociationalism and democracy in a society.

## **2. All-Kosovo elections**

The previous discussion concerned only rules applicable to municipal elections. In anticipation of the all-Kosovo elections, the CEC prepared a new set of Electoral Rules. To date it adopted eight electoral rules: the Code of Conduct, the Rule on Certification of Parties, Coalitions, Citizens' Initiatives and Independent Candidates, the Rule on the Establishment of the ECAC, the Rule on the Municipal Election Commissions (MEC), the Rule on the Election Observers, the Rule on Voter Information, the Rule on Media During the Electoral Campaign and the Rule on The Registration of Candidates.<sup>373</sup>

Basically, the new rules represent a revised version of the rules used for the regulation of the municipal election campaign. Since the major objectives and principles of the regulation remained the same, I will briefly review only the new and amended provisions of the Electoral Rules.

### *a. The Code of Conduct*

The Code of Conduct remains essentially the same, except two amendments concerning the notification about political rallies and conduct of public employees during electoral campaign. The first amendment extends the period for notification about political rallies (now notification must be given to the police authorities 120 hours prior

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<sup>373</sup> See, online: OSCE Homepage < [http://www.osce.org/kosovo/elections/regulatory\\_info/electoral\\_rules.php3](http://www.osce.org/kosovo/elections/regulatory_info/electoral_rules.php3) > (date accessed: 24 August 2001).

to the event<sup>374</sup> as opposed to 96 hours during the municipal electoral campaign). The second amendment imposes prohibitions on certain actions by public employees during the electoral campaign. No political entity may encourage or take advantage of a public employee by using his public position to campaign for a political entity.<sup>375</sup> This provision was motivated by the experience with the municipal electoral campaign. Numerous acts of corruption were reported during the municipal electoral campaign. It was often the case that the KLA and PDK-tied officials that held the key positions in the municipal administration were able to influence the conduct of the electoral campaign in favour of the PDK or the AAK.

Now any use of public position to campaign for a political entity is prohibited. The Code provides for broad interpretation of a “public employee.” A public employee includes, but is not limited to, a person employed by a local administration whose remuneration is received from the Kosovo Consolidated Budget.<sup>376</sup> The Code even contains an example of prohibited behaviour – the head of an educational institution requiring students to attend a meeting organized by a particular political entity.

It will be interesting to observe how this prohibition will be enforced – whether both an official and a political party for which he campaigned will be penalized or only a political party or only an employee. I would suggest that an electoral complaint may be filed on both actions of a party and actions of a public employee. The ECAC may regard a public employee as a supporter of a particular political entity. According to the Code of Conduct, parties are obliged not only to abide by the Code, but also to ensure that party’s supporters do not violate its provisions. If a party fails to ensure a supporter’s compliance with the Code, that party can be held responsible for this violation. The existing electoral rules provide for penalties, which may be readily imposed on political entities as well as on natural persons.

Apart from the two mentioned amendments, the rest of the Code’s provisions have remained the same. Some of them have been reformulated in a more precise and

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<sup>374</sup> *The Code of Conduct for political parties, coalitions, citizens’ initiatives, independent candidates, their supporters and candidates*, CEC/Electoral Rule 1/2001, s.3 (c), online: OSCE Homepage [hereinafter *Code of Conduct*].

<sup>375</sup> *Ibid.*, s.5.

<sup>376</sup> *Ibid.*



clear manner. For example, the new Code of Conduct not only imposes on political entities a duty to abide by its provisions, but also expressly states that any failure to comply with the provisions may result in the imposition of sanctions by the ECAC.<sup>377</sup> Another example is the formulation of prohibited actions. The current Code of Conduct prohibits “using language, in oral or written form, which incites or provokes, or is likely to incite or provoke, another person to commit an act of violence against other persons or property...”<sup>378</sup> In contrast, the Code that applied to the municipal elections referred only to the “use of language which could incite or provoke someone to violence or spread hatred.”<sup>379</sup>

*b. The ECAC*

Having adopted Electoral Rule 2001/2, the CEC laid the foundations for the creation of a new ECAC. The competence of the sub-Commission and the appeal procedures remain the same as during the municipal electoral campaign. The Rule contains two new provisions. First, it provides more guarantees for broader participation of communities in the Sub-commission. The Sub-commission consists of one International Chief Commissioner and three national Commissioners. The Commissioners should be appointed in a manner that represents ethnic groups and national diversity in Kosovo. The Chairperson of the CEC has the discretion to increase the number of the Sub-commission’s members to 5 in order to allow broader participation by communities.<sup>380</sup>

Second, the Rule stipulates stiffer penalties for the violation of electoral rules. In particular, the failure to take a remedial action ordered by the ECAC, or the failure to pay a fine within 7 days of the Sub-commission’s decision, is now considered a violation of

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<sup>377</sup> The Code of Conduct applied to the municipal elections stipulated only that the Code is binding on all political entities.

<sup>378</sup> *Code of Conduct*, *supra* note 374, s.4 (1).

<sup>379</sup> *The Code of Conduct*, *supra* note 326, s. 1.10(10).

<sup>380</sup> Compare to a similar provision of the old Electoral Rule on the Establishment of the ECAC: “The Election Complaints and Appeals sub-Commission shall consist of one International Chief Commissioner and three national deputy Commission members. Members of the Election Complaints and Appeals sub-Commission should have appropriate expertise and experience in the administration of elections.” See, Electoral Rule 2000/2.

the Electoral Rule. The ECAC has to notify the CEC about such a violation and can impose any of the stiffer penalties spelled out in the Electoral Rule.<sup>381</sup>

During the municipal campaign, the failure to take a remedial action ordered by the ECAC, or the failure to pay a fine within the deadline, was not considered a violation under the Electoral Rule. In fact, a prototype of such a norm can be found in the ECAC decisions regarding the municipal elections. Those decisions often contained a provision that the sub-Commission reserved the right to strike a candidate from the list if the applicable fine was not paid on time. Now, not only the failure to comply with the ECAC's ordered correctional actions and financial penalties is a violation, but it can be punished by stiffer penalties.

### *c. MECs and electoral observers*

The MECs are professional and non-political bodies that assist in the conduct of elections at the municipal level. They were established by the CEC in June 2000 in each of Kosovo's 30 municipalities. One of the significant changes for the MECs is that now all members must agree to comply with the Code of Conduct.<sup>382</sup> This was seen as a key to ensuring that the entire electoral process meets international standards.

Observers are important to provide transparency in the electoral process and to develop trust in the elections and their results. More than 6,000 representatives of domestic NGOs and political entities participated as observers during the municipal elections.<sup>383</sup> Observers will continue playing important roles for the all-Kosovo elections. The Rule on Electoral Observers allows representatives of NGOs and political entities to observe voter registration and electoral process. To participate as an observer, a person must be a registered voter and sign a statement agreeing to abide by the electoral rules. All observers must be accredited by the CEC.

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<sup>381</sup> *Code of Conduct*, *supra* note 374, s. 5.

<sup>382</sup> The Rule on the Establishment of the MECs applied to the municipal elections did not contain such a requirement.

<sup>383</sup> Kosovo Elections: Rules adopted on Municipal Election Commissions and Election Observation, online: OSCE Homepage <  
[http://www.osce.org/news/generate.php3?news\\_id=1800](http://www.osce.org/news/generate.php3?news_id=1800)> (date accessed: 17 July 2001).

In general, the new electoral rules are more precise and stricter. The changes were inspired primarily by two factors: the crucial character of the Kosovo-wide elections,<sup>384</sup> and experience from the municipal electoral campaign.<sup>385</sup>

The new rules adopted by the CEC demonstrate the determination of the international administration to require strict compliance with the norms of electoral conduct. The adoption of a strict policy that the international community will not tolerate violence and other forms of party misconduct creates certain expectations within local political structures and may constrain their inappropriate tactics. At the same time, coercion should be used carefully, given that most parties are in the early stages of their formation.

The balance between coercion and democracy will alter, depending on the stage of rehabilitation. Coercion may be more readily applied at the beginning of democratization, but reduced over time, when the conditions for democratic government become more stable.

The new electoral rules as such are not more consociational than the rules for the municipal elections. Generally, the electoral regulation is targeted not so much at ensuring the inclusion of minorities, but at providing fairness in electoral competition and a reduction in voter manipulation. In terms of the indirect impact that electoral regulation has on the formation of interethnic coalitions and moderation of the position of parties, the effect of the rules will depend mainly on the determination of the international administration to hold to their strict enforcement. The electoral rules for the all-Kosovo elections are stricter against the speculation over ethnic sentiment and the misuse of public position, so if enforced actively they may stimulate the exclusion of these

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<sup>384</sup> The main concerns about the upcoming elections are: providing a secure and stable environment during the electoral campaign (the electoral campaigns of the parties will inevitably include debates over Kosovo independence, which may be destabilizing for Kosovo); ensuring legitimacy of the electoral process and the newly created Assembly (It can be expected that when seats in the Kosovo legislature are at stake, parties will campaign more actively and use more aggressive techniques. This poses a threat of increased violence and corruption); providing that the elected bodies cooperate with the international administration; and that the Assembly consists of moderate supporters of the Kosovo independence who are not likely to take any unexpected actions as, for example, demanding Kosovo independence.

<sup>385</sup> The municipal campaign provided important feedback about the effect of the adopted regulations. It demonstrated situations in which the regulation was insufficient or ambiguous. As a result, the new rules contain more precise and detailed provisions.

techniques from parties' electoral tactics and make them turn more attention to cooperative means for winning elections.

### **Interim Conclusion**

Electoral regulation has two aspects. Its first and primary purpose is to ensure maximum stability during the electoral campaign and fair competition among parties. Second, carefully tailored electoral rules and their appropriate enforcement facilitate the implementation of the consociational techniques and achievement of a consociational result.

We have analyzed the rules that regulate the party behaviour at different stages of electoral campaigning – when a party seeks to enter the political arena, during the campaigning period and after the elections. The international administration was able to create a comprehensive regulatory mechanism, which included both standards of behaviour and means to enforce those standards. In their unity the pre-electoral, electoral and post-electoral regulation of party conduct plays a crucial role in ensuring more peaceful and fairer competition among political parties. This is especially important in a post-conflict society where violence and intimidation are still considered justifiable means for achieving political goals.

The electoral regulation has far-reaching impact on the composition of representative organs and their work: through the registration of parties, authorities can prevent the legalization of openly nationalistic parties; sanctions for violation of electoral conduct exclude radical parties, which use intimidation, violence and incitement of hatred in electoral campaigns, from running in elections. The above-mentioned means prevent extremist elements from entering the legislature, thus, making these organs potentially more cooperative and more sensitive to minority issues. This, in turn, creates basis for a workable grand coalition. This is especially important in the light of previously analyzed rules of procedure and decision-making in the Municipal Assemblies. Because many decisions can be made by majority and there are no strong mutual veto powers, minorities are more vulnerable. The fact whether their interests will be given enough attention to great extent depends on how understanding and supportive to minority interests the majority members are.

Although the described means may provide for more cooperative members of the Assemblies, these means as such are not intended to facilitate minority inclusion. They may only create some favourable grounds for realization of the principles of consociationalism – proportionality and grand coalition. Thus, to mitigate the ethnic majority victory in the elections, the international community had to resort to other means, in particular, appointment of minority representatives to newly elected legislative organs. The next section describes the results of the municipal elections and the appointment of minority representatives in Municipal Assemblies.

## **D. Electoral Process and Electoral Results<sup>386</sup>**

### **1. Local peculiarities**

As pointed out at the beginning of this Chapter, the electoral process in Kosovo is influenced by a number of factors: 1) ethnically motivated behaviour of the population; 2) ethnic distribution of the population among municipalities; and 3) non-participation of some minorities in elections. We have briefly discussed what impact these factors are likely to have on electoral results.<sup>387</sup> Now let us look at the actual situation with the elections in Kosovo.

The municipal elections were held throughout all the Kosovo. However, because of the Serb's boycott of both elections and voter registration, the elections effectively took place only in 27 out of 30 Kosovo municipalities. In three northern municipalities inhabited mostly by Serbs – Leposavic, Zubin Potok and Zvecan – the elections were held, but their results were not certified because the majority of Serb population neither registered nor voted.

The general voter turnover appeared to be high – 79% of voters.<sup>388</sup> The turnover of minority members varied from community to community. For example, few Kosovo

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<sup>386</sup> This Section describes only the results of the 2000 municipal elections in Kosovo.

<sup>387</sup> See, section A of this Chapter.

<sup>388</sup> Press Release, 10 November 2000, online: OSCE Homepage < [http://www.osce.org/kosovo/news/generate.php3?news\\_id=1266](http://www.osce.org/kosovo/news/generate.php3?news_id=1266) > (date accessed: 5 January 2001).

Turks and Roma came to vote. At the same time, other communities, like the Kosovo Bosniac and Gorani communities showed high levels of participation.<sup>389</sup>

A negative impact of non-participation on the electoral process can be observed in two aspects. First, it denies certain ethnic communities the right to have their representatives elected. Second, it requires the use of co-option of minority members by the SRSB, thus, making minority representation contingent on outsider regulatory interference.

Earlier, we have theoretically predicted that votes in Kosovo will be split along ethnic lines. The empirical evidence about the correlation of minority population in a particular municipality and the percentage of votes obtained by party based on particular ethnic affiliation confirms this proposition. The data is presented both in a table (below) and in a graphic format (For graphs, see Appendix 3 and 4).

**Table 3. Minority population per municipality**

Municipality	Serbs	Ashkali	Turks
<i>Glogovac/Glogovac</i>	0		
<i>Malishevë/Mališevo</i>	0		
<i>Skenderaj/Srbica</i>	302	120	
<i>Kaçanik/Kaçanik</i>	0		
<i>Ferizaj/Uroševac</i>	24	4200	
<i>Podujevë/Podujevo</i>	471	1000	
<i>Suharekë/Suva Reka</i>	799		
<i>Shtime/Štimlje</i>	31	400	
<i>Deçan/Deçani</i>	30		
<i>Rahovec/Orahovac</i>	1,733		
<i>Vushtrri/Vushtrrit</i>	3,571	130	300
<i>Prishtinë/Priština</i>	11,966		100
<i>Klinë/Klina</i>	12		

<sup>389</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2000/1196, December 15, 2000.

<i>Viti/Vitina</i>	3,943		
<i>Pejë/Pe•</i>	1,263		
<i>Mitrovica/Mitrovica</i>	9,057	170	600
<i>Prizren/Prizren</i>	198		12000
<i>Gjilan/Gnjilane</i>	13,479		2000
<i>Istog/Istok</i>	207		
<i>Lipjan/Lipljan</i>	10,967	1500	
<i>Fushë Kosovë/Kosovo</i>			
<i>Polje</i>	4,819	2500	
<i>Gjakovë/• akovica</i>	18		
<i>Kamenicë/Kamenica</i>	22,286		
<i>Obiliq/Obili•</i>	2,928	800	
<i>Novobërdë/Novo Brdo</i>	2,070		
<i>Štrpce/Shtërpçë</i>	8,523		
<i>Zubin Potok/Zubin Potok</i>	15,795		
<i>Dragash/Dragaš</i>	0		
<i>Zve• an/Zveçan</i>	9,444		
<i>Leposavi• /Leposaviq</i>	16,302	190	

Source: KFOR and OSCE Estimates

**Table 4. Votes per Municipality, %**

<b>Municipality</b>	<b>PDASHK (Ashkali)</b>	<b>SDA (Bosniac)</b>	<b>DRSM (Turk)</b>
<i>Deçan/De• ani</i>			
<i>Dragas/Dragas</i>		11.4	
<i>Gjakovë/• akovica</i>			

<sup>390</sup> The KTHP did not win any municipal council mandates.

<i>Gllgovc/Glogovac</i>				
<i>Gjilan/Gnjilane</i>				
<i>Istog/Istok</i>			2.5	
<i>Kaçanik/Ka• anik</i>				
<i>Klinë/Klina</i>				
<i>Fushë Kosovë/Kosovo</i>				
<i>Polje</i>	4.1			
<i>Kamenicë/Kamenica</i>				
<i>Mitrovicë/Mitrovica</i>	0.3		0.5	
<i>Lipjan/Lipljan</i>	1.5			
<i>Novobërdë/Novo Brdo</i>				
<i>Obiliq/Obili•</i>				
<i>Rahovec/Orahovac</i>				
<i>Pejë/Pe•</i>			2.8	
<i>Podujevë/Podujevo</i>	0.4			
<i>Prishtinë/Priština</i>	0.1		0.1	
<i>Prizren/Prizren</i>				2.8
<i>Skenderaj/Srbica</i>				
<i>Shtime/Štimlje</i>	0.9			
<i>Štrpce/Shiërpçë</i>				
<i>Suharekë/Suva Reka</i>				
<i>Ferizaj/Uroševac</i>	1.0			
<i>Viti/Vitina</i>				
<i>Vushtrri/Vu• itrri</i>				
<i>Malishevë/Mališevo</i>				

Source: The data is accumulated from the Kosovo Elections Results, online:  
OSCE Homepage  
[http://www.osce.org/kosovo/elections/archive/2000/results\\_parties.php3](http://www.osce.org/kosovo/elections/archive/2000/results_parties.php3)>



As we see, there is quite a clear correlation between the numeric weight of particular ethnic groups in a municipality and the percentage of votes received by parties of the same ethnic affiliation. For example, in Pec where the Bosniac community amounts to 6 000 people (approximately 6% of the population), the SDA received 2,8% of the total votes. Similarly, in Kosovo Polje (the municipality with a substantial Ashkali community), the Ashkali party won 4,1% of votes.

Among the parties of the same ethnic affiliation, the success of a party mainly depends on the history of its previous activities, rather than its current platform. Among Albanian parties, the LDK and the KLA-tied parties have a historical record,<sup>391</sup> which ensures them popular support. Those who fought for Kosovo independence are most likely to vote for the PDK or the AAK. The electoral results show that the PDK won the majority of votes in municipalities where the KLA had the strongest influence. For example, this is the case in Glogovac. The elderly people and more moderate supporters of the Kosovo independence are likely to vote for the LDK.

## 2. Electoral results

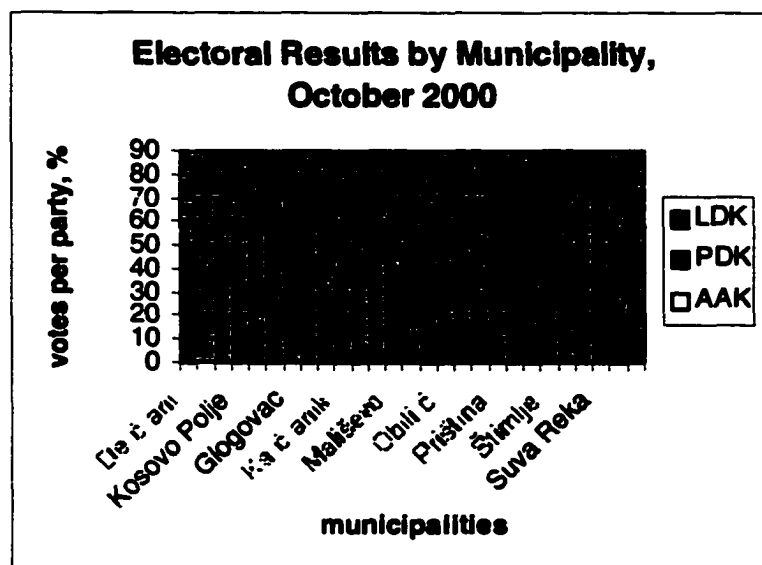
The results of the 2000 municipal elections will be viewed in two dimensions. First, we will evaluate the statistical data showing which parties won the elections and the number of seats they received. Second, we will consider the number of minority representatives appointed by the SRSG and the ethnic balance within the Municipal Assemblies and organs created by them. In both cases I will look at the correlation of the ethnic breakdown of population in a municipality and the number of representatives from each ethnic community in the municipal organs.

Because of the low participation of minority parties, the main competition at the elections developed among Albanian parties. The three major Albanian parties – the LDK, the PDK and the AAK – most actively participated in the electoral campaign. The AAK and the LDK stood for elections in 29 out of 30 municipalities. The PDK had its candidates in 27. The LDK led by Ibrahim Rugova won a majority in 21 municipalities,

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<sup>391</sup> See, section A(1) of this Chapter. It should be noted that at the first elections, the electorate's support for the parties *de facto* in power during the conflict, is not surprising. Rather, it is a predictable reflection of people's fears, intimidation and preference to follow the known established leader.

with the total of 58% of votes in the Province.<sup>392</sup> The PDK and the AAK together won about 35% of the total vote.<sup>393</sup>



Minority parties stood for elections in 13 municipalities. Representatives of minority parties were elected in 5 municipalities. In particular, in Dragas the Gorani Citizens' Initiative (GIG) won three seats and the Bosniac Party of Democratic Action of Kosovo (SDA) won two seats. The SDA also won seats in Istok and Pec. The Democratic Party of Albanian Ashkaelia in Kosovo (PDAShK) won one seat in Kosovo Polje. In Prizren, the Bosnian Party of Democratic Action (BSDAK) won two seats and the Democratic Reform Party of Muslims (DRSM) won one seat. Nevertheless, the SRSG has co-opted additional minority representatives in all these municipalities, except Dragas. This situation demonstrates that the proportionate system ensured the election of some minority representatives, but still their number was not sufficient to guarantee meaningful participation of minorities in government. Consequently, the co-option of minority members by the SRSG became necessary. Let us seen in more detail how this process was carried out.

<sup>392</sup> Municipal Elections 2000: Final Results, online: OSCE Homepage <http://www.globeandmail.com/gam/ROB/20010312/RAIRR.html> (date accessed: January 17, 2001).

<sup>393</sup> *Ibid.*

### 3. Appointments

Because of the non-participation of some minorities in the elections and limited success of minority parties even in municipalities with significant minority population, the elections did not provide for intended proportional representation of minorities in the Municipal Assemblies. To ensure fair representation of all ethnic communities, the SRSG had to use his power to co-opt minority members to Municipal Assemblies.<sup>394</sup>

As of 1 March 2001, 123 representatives were appointed. Among 123 appointed and 869 elected members of Municipal Assemblies, 91 were Kosovo Serbs, 14 Bosniacs, 10 Ashkalia, 9 Roma, 5 Turks, 4 Egyptians and one Croat.<sup>395</sup> Minority members were appointed in addition to the fully elected Municipal Assembly, thus increasing the number of assembly representatives over the figure stipulated by the UNMIK Regulation On Self-Government in Municipalities.<sup>396</sup> According to the OSCE Report issued in March 2001, no nominations were made in Decani, Dragas, Glogovac, Malishevo, Suva Reka and Kacanik. There were either no minorities reported, or very small ethnic communities there.

The number of appointees varies from municipality to municipality. (See Table 5)

**Table 5. Minority Appointees in Municipal Assemblies**

Municipality	Serbs, %	Appt. Serbs, MA Mbs, %	Roma, %	Appt. Roma, MA Mbs, %	Ashkali, %	Appt. Ashkali, MA Mbs, %	Bosniacs	Appt. Bosniacs, MA Mbs, %	Turks	Appt. Turks, MA Mbs, %
Deçan/Deçani	0	N/A	2							
Dragash/Dragaš	10	N/A	0				14			
Ferizaj/Uroševac	3		1	2		2				

<sup>394</sup> Under the Regulation on the Self-government of Municipalities in Kosovo, the SRSG has the power to co-opt additional members to the Municipal Assemblies to ensure fair representation of the local communities.

<sup>395</sup> *Assessment of the Situation of Ethnic Minorities in Kosovo*, OSCE Report, March 2001, at 22.

<sup>396</sup> *Regulation on the Self-government of Municipalities in Kosovo*, *supra* note 281.

<i>Fushë Kosovë/Kosovo Polje</i>	2	15	6		5	4			
<i>Gjakovë/• akovica</i>	0		30						
<i>Gjilan/Gnjilane</i>	12	12	0.4	2				2	2
<i>Gllgovc/Glogovac</i>	0		0						
<i>Istog/Istok</i>	0.8	3	8				4		
<i>Kaçanik/Ka• anik</i>	0		0.5						
<i>Kamenicë/Kamenica</i>	30	16	1	2					
<i>Klinë/Klina</i>	0	3	5	3					
<i>Leposavi• /Leposavi q</i>	98		1		1		6		
<i>Lipjan/Lipljan</i>	15	10	2	2	9	2			
<i>Malishevë/Mališevo</i>	0		0						
<i>Mitrovica/Mitrovica</i>	7	22	0.1		0.1		2.6	2	0.4
<i>Novobërdë/Novo Brdo</i>	46	14	0	2.5					
<i>Obiliq/Obili•</i>	17	17	14	3.5	3	3.5		5	
<i>Pejë/Pe•</i>	1	4	2	2					
<i>Podujevë/Podujevo</i>	0.5		0		1	2			
<i>Prishtinë/Priština</i>	4	10	0.3	2	1	2	0.3	2	2
<i>Prizren/Prizren</i>	0.1		3	2			2.3	2	5
<i>Rahovec/Orahovac</i>	3	3	1	3					
<i>Shtime/Štimlje</i>	0		2		1	4			
<i>Skenderaj/Srbica</i>	0.5	6	0		0.2				
<i>Štrpce/Shtërpçë</i>	70	50	0						
<i>Suharekë/Suva Reka</i>	1		1						
<i>Viti/Vitina</i>	7	12	0					2.5	
<i>Vushtrri/Vu• itrn</i>	5	9	0.4		0.9				
<i>Zubin Potok/Zubin</i>	84		0						

<i>Potok</i>									
<i>Zvean/Zveçan</i>	95		0						

Source: Data accumulated from the OSCE Reports

As a rule, minority representatives should be appointed proportionally to the number of that particular minority in the municipality's population. As we can see from Table 5, this rule was not always followed. One can notice significant differences between the percentage of the minority population and the number of appointed representatives in many municipalities. For example, in Mitrovica 7% of the population are Serbs, but the number of Serb appointees amounts to 22% of the Municipal Assembly. There are 0.5% Serbs in Srbica, but Serb representatives in the Municipal Assembly constitute 6%. At the same time, the Roma community in Istok (8% of the municipality's population) did not receive any representation. The absence of a rational correlation between the percentage of minorities and the number of minority appointees led to numerous complaints about the criteria for appointment. For example, the Turkish community in Vucitrn (there is an estimated 300 Turks<sup>397</sup> there) complained that they have not benefited from co-option. They submitted a petition to the SRSG, but no appointments were made as of March 2001.<sup>398</sup>

There is an inconsistency between the theoretical approach to the formation of representative organs and its practical implementation. On the one hand, all the basic documents issued by the UNMIK<sup>399</sup> emphasize fair and proportionate representation of communities. On the other hand, when it comes to implementation there is no data about the number of ethnic communities that can be used as a criterion for appointment. As mentioned, the Joint Registration Taskforce did not collect data on the ethnic affiliation of the applicants. Thus, there was no official record on a number of minorities in a given municipality. As a result, it was difficult to assess which minorities were under-

<sup>397</sup> *Assessment of the Situation of Ethnic Minorities in Kosovo*, OSCE Report, September 2000 at 54, online: OSCE Homepage <http://www.osce.org/kosovo/publications/pdf/mibrep.pdf> (date accessed: February 12, 2001).

<sup>398</sup> *Ibid.*, at 22.

represented and what level of co-option they required. Thus, the appointments by the SRSG are arguably legitimate because it is not clear what objective standard have been used for making decisions. The co-option by the SRSG, on the one hand, advances consociationalism by implementing proportionality and creating more preconditions for grand coalition. On the other hand, the original consociational model has nothing to do with such interventionist techniques as co-option. To my mind, such deviation from the original consociational model is justifiable given the peculiarities of the Kosovo situation. The power of the SRSG would not contradict the spirit of consociationalism so far as it advances more inclusive grand coalition government.

However, from the position of the peace-building concept, co-option by the SRSG is more problematic. The lack of clarity about the criteria for appointment creates doubt about transparency and objectivity of the decision-making process. In this respect, the administration itself seems to violate the two principles that it seeks to introduce in the self-governing bodies. In acting so, the UNMIK undermines its own democratic tenets and consequently its credibility with the local population.

#### **4. Effect of appointments and elections on minority participation in decision-making**

The appointment of minority representatives is only the first step in ensuring minority participation in decision-making. The long-term impact of the elections on the formation of consociational democracy and minority protection in Kosovo depends on the work of the organs created by Municipal Assemblies.

The powers and policy of municipalities are formulated through the structure of its organs. Consequently, the ability of minority representatives to have a real say in municipal management depends on the position that they occupy within municipal organs. To examine the actual role that minorities may assume in relation to municipal organs, let us look at the composition of municipal organs (Appendix 5). It is apparent that minority representatives have assumed seats in the Mediation Committee and the Communities Committee as required by the Regulation on Self-government of

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<sup>399</sup> See, e.g., Regulation on Self-government of Municipalities in Kosovo, the Constitutional Framework for provisional Self-government of Kosovo.

**Municipalities.** In relation to other organs, where minority participation is not required (e.g., the Finance and Policy Committee, the Board of Directors), the seats have usually been divided among two or three parties that received a majority of votes in that municipality. (See, Appendix 6)

For example, as a result of the LDK victory, it received the position of the presidency and deputy presidency in 21 municipalities. The PDK representatives were elected presidents of Municipal Assemblies in 5 municipalities and deputy-president in 6 municipalities. In Serb municipalities where the SRSG appointed all the members, the presidency and deputy-presidency was given to minority parties and independents.

Another two important municipal bodies - the Policy and Finance Committee<sup>400</sup> and the Board of Directors<sup>401</sup> – are also dominated by the representatives of the Kosovo Albanian parties in the majority of municipalities. In these organs minorities are represented only in five municipalities: Dragas (GIG and SDA members), Gnjilane (one Kosovo Serb), Novo Brdo (three Kosovo Serbs), Kamenica (two seats for Kosovo Serbs) and Vitina (two seats reserved for Kosovo Serbs). The inclusion of minorities in those municipalities may be viewed as a positive trend towards the inclusion of minority representatives even when it is not legally required.

## **E. Conclusions to the Chapter**

As evidenced from the Kosovo study, both substantive and procedural legal rules play important roles in the general development of democratization as well as in the implementation of the elements of consociationalism. The following may be regarded as the three most important aims that a legal regime helps to achieve in post-conflict democratization:

- 1) Legal rules define and support goals that international and local actors seek in the post-conflict reconstruction. For Kosovo, the most vivid example is the Constitutional Framework for Provisional Self-government. It was the first document that, after the two

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<sup>400</sup> The Policy and Finance Committee is responsible for proposing the budget and formulating and researching the future strategic direction of the municipality. See, *REGulation on Self-government of Municipalities*, *supra* note 281, s.22.1.

years of international presence, finally defined what institutional model of democracy is to be built in Kosovo. The positive effect of such definition is twofold. First, it demonstrated that the UNMIK has a clear idea about the model to be pursued in Kosovo and, consequently, created certain expectations about the formation of the political system, the balance of power between the branches of government and other tendencies of political life inherent in the parliamentary model. Second, it has helped to channel all the international activities towards an ultimate end – parliamentary democracy. Third, it indicated the system of organs in which the elections had to be held and, thus, allowed the planning of the relevant international activities.

2) Legal rules provide a framework for power sharing. For Kosovo, the power sharing is exercised in a vertical dimension (division of responsibilities between the SRSG and the Provisional Institutions) as well as in a horizontal dimension (separation of powers among the branches of self-government). The recently adopted Constitutional Framework provides for wider competence of the Provisional Institutions of Self-government. At the same time, many core questions of internal administration and external relations remain within the authority of the SRSG. Even with the election of the Municipal Assemblies and the prospective development of Provisional Institutions, he retains his two most essential powers – to legislate and to appoint and remove all the officials in the administration. This situation reveals a contradiction between two trends: on the one hand, the UNMIK attempts to promote the accountability of local organs and the delegation of powers to them; on the other hand, it facilitates the monopolization of power in the hands of an international representative. It is not clear how the international administration will develop responsible self-sustainable self-government if the administration exercises constant control over the most significant steps taken by local bodies. The Framework's provisions do not establish clear criteria as to the conditions under which the SRSG may resort to his dormant powers. Thus, one can only trust that the wisdom of the SRSG will not allow excessive use of his powers. In this respect, the potential of legal rules to provide guarantees for the development of self-government has

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<sup>401</sup> The Board of Directors assists the Municipal Assembly and its committees by providing all necessary information and reports for the decision-making process; assists the President and the Chief Executive Officer; and implements all decisions of the municipality. See, *ibid.*, s.31.2.



not been used fully. The rules might have been more precise about the limits of the interference by the SRSG.

From the point of view of the peace-building concept, the existence of such powers of the SRSG may be acceptable. The contradictions may arise at the stage of the enforcement of these powers. Though the control of the SRSG over self-government is necessary, it is important that it is not abused. Otherwise the functioning of the Kosovo administration will remain contingent on external interference and local political parties will not be ready to maintain the created structure after the withdrawal of the international presence. One of the most difficult points in this respect is to define a clear and objective criterion which would allow one to judge when the intervention by the SRSG is appropriate and when it threatens to usurp the decision-making power of the self-government organs.

3) The legal regulation of the electoral process has two aspects: 1. The design of the electoral system is stipulated in legal rules. This helps to create the preconditions for minority inclusion in representative bodies, for the creation of interethnic coalitions, and for moderation of positions of political parties. 2. There are also rules regulating the electoral conduct and ways of its enforcement. This side of regulation provides an important contribution to the general stability of the situation in the Province during the electoral campaign, for fairer competition among the parties, and for the creation of more cooperative representative bodies.

The elements of consociationalism are mainly implemented through legal rules, which stipulate the design of the electoral system, the composition of state organs and the decision-making procedures in those organs. On the one hand, the existence of an international administration in Kosovo offers some avenues for the implementation of consociationalism. Due to the coercive power that the UNMIK has in the Province, it makes possible the implementation of consociational techniques, which are otherwise not likely to be adopted by the parties. On the other hand, because the maintenance of those consociational techniques is dependent on international pressure, the crucial question is how to make the existing system of organs and rules sustainable.

Here is a brief summary of how the elements of consociationalism were implemented in Kosovo. Its principles were used to a different extent at the provincial

and at the municipal level. At the municipal level, proportionality was used for the electoral system, for appointment of co-opted minority members and for the allocation of seats in some organs created by the Municipal Assemblies (e.g., the Communities Committee and the Mediation Committee). At the provincial level, proportionality was employed as a basis for the electoral system and as a guideline for allocation of seats in some organs created by the Assembly. Through the proportional allocation of seats among majority and minority communities, the international administration sought to achieve inclusiveness of the ethnic segments of Kosovo society. The existence of such participation is a precondition for the creation of grand coalitions. Another precondition – willingness of the segment leaders to cooperate – was to a certain extent ensured through the rules of electoral conduct. This helped to prevent more openly nationalistic parties entering the legislature.

Mutual veto as a means to protect the interests of minorities is also used differently at the municipal and provincial level. The rules regulating the functioning of the Kosovo Assembly create a very beneficial moderate mutual veto. In contrast, at the municipal level minorities have no veto power. On the one hand, a mutual veto is appropriate only for resolution of the most important matters concerning the whole Kosovo population or particular minority groups. A mutual veto at the municipal level might be regarded as an unreasonably complicated system of decision-making. Moreover, the municipal committees may be viewed as sufficient guarantees for the protection of minority interests. Unfortunately, the municipal committees have limited powers and, in my opinion, cannot provide sufficiently effective protection of minority interests. The lack of such protection means that more responsibility for monitoring and minority protection will be put on the provincial institutions, including the SRSG. In turn, the more interference by an international administration is required, the less the chances are for the development of responsible and sustainable self-government, which contradicts the goal of peace-building. Thus, I would recommend some model of a moderate mutual veto to be adopted, not only at the provincial, but also at the municipal level.

In relation to the Kosovo Assembly there is an imbalance in the application of the elements of consociationalism to different organs. For example, the rules for the election of the Kosovo President do not require him to receive minority support. Given the symbolic

nature of the president's office, it is important to ensure that he is considerate of the minority interests. Thus, in relation to the electoral procedure, the available tools of consociationalism were not utilized to full extent. At the same time, such an element as proportionality is excessively used as a requirement in the composition of the Assembly's committees. I have some doubts if proportionality will not override the criterion of individual merit. Because much of the work of the Assembly is done through its committees, it is important to ensure that they are composed of people with an appropriate level of expertise.

In general, the very implementation of the elements of consociationalism through substantive and procedural rules may be viewed as a good precondition for minority incisiveness and mitigation of the tensions among the majority and minorities. Some mechanisms are particularly well-tailored and constitute an important contribution to the development of the practice and theory of consociationalism; others were not elaborated with necessary care. There is still a search for the happy medium between more minority protective consociational techniques and techniques that are politically acceptable to international and local actors.

## **Chapter IV**

### **Re-establishment of the Judiciary and the Police**

One of the necessary requirements for successful peace-building is coherency in its strategy. This, *inter alia*, means that certain principles, like those of consociationalism, are introduced in relation to all branches of government and all institutions where applicable. Lijphart considered that minority and majority inequality can be resolved mainly through the representative branch of government and, accordingly, addressed his recommendations to the legislature and partially to the executive. I argue that, similarly to proportionate representation of minorities in the government, multi-ethnic judiciary and police contribute to meaningful participation of minorities in governmental structures and to the sense of their inclusiveness in social and political structures. Thus, special consociational techniques are also necessary for the judiciary and the police. I do not automatically apply to the judiciary and the police the principles of consociationalism which were developed specifically for the representative branch. Rather, I try to show the particular way in which courts and the police can contribute to the meaningful inclusiveness of minorities in society and how consociational techniques can reinforce their role in this process.

In this Chapter I look at the institutional structure of the judiciary, the applicable law and the actual application of that law by the courts. In addition to that, I dedicate a separate section to the activities of the law enforcement authorities in Kosovo and their cooperation with the courts. My task here is not to describe all the inconsistencies in the application of law by judges and prosecutors, but rather to review the most common violations and to project their effect on the democratization of Kosovo. The ultimate purpose of this analysis is to reveal the role of the institutional structure of the judicial and police systems and of the applicable law in ensuring equal protection to members of all ethnic communities, as well as strengthening their inclusiveness in state structures.

## **A. The role of the judiciary and police in ethnically divided societies**

### **1. General Observations**

Many political science scholars<sup>402</sup> who analyzed the preconditions for stable democratic governance in ethnically divided societies have concentrated their attention primarily on the role of representative bodies in providing inclusiveness for all ethnic groups. In this respect, the judicial and police systems seem to be unreasonably ignored. Similarly to representative bodies, courts and police are subject to the influence of ethnic division. Courts dominated by ethnic majority judges may be biased or perceived as biased against minority defendants. The ethnic composition of the police affects how it performs its duties, how willing it is to accord equal protection to members of all ethnic communities or to discriminate against them. Further, control over organs of law enforcement may often be a guarantee for continuation of the dominance of the ruling group. Because of that, “[e]thnic groups who are underrepresented in state security forces see the military-police imbalances as reflections of their overall political vulnerability.”<sup>403</sup> Since in a long-term the composition and functioning of the judicial and police systems becomes a factor that can solidify ethnic exclusion and inter-group tension, particular attention should be drawn to the founding principles and functioning of the judiciary and the police.

The role of the judiciary in a post-conflict society is several fold: 1) supporting the rule of law and contributing to the maintenance of order and security; 2) providing inclusiveness of minorities through their fair treatment and representation in the judiciary; 3) providing policy guidelines through constitutional adjudication and interpretation concerning the balance of power among the branches of government, the scope of individual and collective rights and limits on the authority of the state to interfere with the exercise of those rights, etc.<sup>404</sup> In sum, the role of the courts falls within one of two broad categories – policy-making or the routine resolution of practical matters.<sup>405</sup> During the first years after a conflict, courts usually have to concentrate primarily (if not exclusively) on the resolution of practical

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<sup>402</sup> Horowitz, *supra* note 33 & 35; Lijphart, *supra* note 41; Wippman, *supra* note 58.

<sup>403</sup> Cynthia H. Enloe, *Police, Military and Ethnicity* (New Brunswick: Transactions Inc., 1980) at 146.

<sup>404</sup> In one way or another each of these issues has an impact on the position of minorities in society.

<sup>405</sup> In a common law system decision of any case may be regarded as a policy making development. Here, I would like to distinguish the high profile policy making by the Supreme court which is likely to have effect on all levels of government from the minor, local, potentially policy-making role of lower courts.

matters. Commonly, one of the primary concerns of an international mission is restoration of law and order. For an international mission, “[t]he failure to address past and ongoing violations promptly and effectively, and to create a sense of law and order, can impede the broader objectives of the operation.”<sup>406</sup> The lack of adequate law enforcement can undermine the authority of the mission and negatively affect the willingness of the population to respect law. Thus, criminal adjudication and general law enforcement become one of the immediate priorities of an international administration.

Only with time will the development of the courts’ power of constitutional adjudication take place. Because immediately after a conflict the policy-making role (through constitutional adjudication) of the highest court is usually absent (at least that was the case with Kosovo), the pressure to provide inclusiveness and equality shifts to routine criminal and civil adjudication.

Generally, courts contribute to the inclusiveness and protection of minorities in several ways. First, through the composition of courts. For all types of adjudication, the diversity of the judiciary is important as a precondition for overcoming stereotypes and biases. The representation of different perspectives in the judiciary, including the one stemming from particular ethnic affiliation, is important for a more flexible and open-minded judicial process and decision-making.<sup>407</sup> Such diversity is particularly important for supreme courts that play an active role in policy-making.

Second, courts contribute to inclusiveness through actual decision-making, application and development of law. Through constitutional adjudication courts provide policy guidelines for other branches of government and in this way influence minority inclusiveness and the protection of collective minority rights at the national level. Criminal and civil adjudication works more at the level of individual and local community and is more concerned with individual rights and protection. To date, the practice of the Kosovo courts has primarily targeted the resolution of criminal matters. Thus, criminal adjudication will be the context for the assessment of the role of the courts in providing inclusiveness.

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<sup>406</sup> Hansjorg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor” (2001) 95 AJIL 46 at 47.

<sup>407</sup> See, e.g., R. Devlin, A. Wayne MacKay & N. Kim, “Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a “Triple P” Judiciary” (2001) 38 Alb. L. Rev. 734 at 792-808.

The role that the re-established or newly created courts assume in a post-conflict society is largely defined by a combination of three factors: the approach of the international administration to the re-establishment of the judicial system (principles on which the judiciary is built, the definition of the applicable law, the time frame for the re-establishment of the court structure, etc.); the composition of courts and courts' willingness and ability to utilize applicable law; and the attitude of the population to the court system.

In the first months after a conflict, an international administration plays a founding role in relation to the court system. It not only provides the structure and jurisdiction of courts, but also specifies what laws should be applied and how. In addition to that, the international administration monitors the compliance of the courts with established standards of fairness, independence and impartiality. However, some areas, like the ability and willingness of judges to utilize applicable law, are difficult to control by legal means. I support a view that judicial decisions are not solely the result of a judge's logic and rationality, but also a result of the judge's personal and professional characteristics. After a deadly ethnic conflict, judges will not always be willing to put law and human rights above personal fears, intolerance or hatred. Those feelings find their expression in judicial bias, which is likely to have tremendous impact on court procedures and decisions. This trend is especially dangerous at the initial stages of the reconstruction when the law enforcement system operates in emergency mode (i.e., the rules imposing stricter penalties or extended detention, etc. are introduced). The prioritized activity of restoring order may, to a certain extent, interfere with the exercise of the second function of the courts – fair treatment and protection of minorities. The emergency powers of the courts and law enforcement organs may sometimes be utilized by biased officials as tools to discriminate against minority members. This question will be discussed in the following sections.

Another factor in the functioning of courts is the ability of judges to apply human rights standards. In states exhausted by a lengthy conflict, judges may often lack knowledge of law and up to date legal training, especially in the field of human rights. Moreover, in many post-socialist states human rights laws have never been applied before and, consequently, the judiciary does not have the necessary knowledge in this field.

The functioning of courts in the first years after cessation of hostilities is likely to have significant impact on the population's perception of the court system. The certainty in

protection and non-discrimination, the belief in court system as legitimate, independent and impartial is one of the founding stones for political and social stability.

Having described the importance of the judicial system in general, I would like to proceed to a more detailed analysis of the Kosovo situation.

## **2. Kosovo peculiarities**

In order to fully understand the challenges of establishing and administering the judiciary and police in Kosovo, one should be aware of the security situation in Kosovo in the first months after the UNMIK deployment.

The security situation in Kosovo was shaped by a number of factors. The Yugoslav and Serb police forces were withdrawn from the territory of Kosovo according to the requirements of SCR 1244.<sup>408</sup> The Yugoslav and Serb forces stopped functioning or were withdrawn before the international security presence assumed effective control over the Province. This temporary security vacuum resulted in a deteriorated security situation.<sup>409</sup> In the absence of effective state authority, Kosovo military and criminal groupings attempted to expand their influence over the province's territory,<sup>410</sup> competing for the areas of influence. For example, the KLA was able to establish *de facto* control over the majority of Kosovo municipalities.<sup>411</sup> Thus, the situation was difficult to control and the UNMIK had to reconcile its power with the *de facto* authorities. The security challenge was reinforced by the unregulated return of refugees<sup>412</sup> and constant move of internally displaced persons. According to the Report of the Secretary-General of 12 July 1999, 650,000 refugees returned to Kosovo in June-July 1999.<sup>413</sup> Because of limited resources the returnees had literally to compete for housing and material support. They often resorted to violence and intimidation to satisfy these needs, thus increasing instability in the Province.<sup>414</sup> At that time, the KFOR was not capable of dealing with multiple security challenges because it was still in the

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<sup>408</sup> Security Council Resolution 1244, *supra* note 106, para 3.

<sup>409</sup> *Report of the Secretary-General of 12 July 1999*, *supra* note 107, para. 5 at 2.

<sup>410</sup> Strohmeyer, *supra* note 406 at 52.

<sup>411</sup> *Assessment of the Situation of Ethnic Minorities in Kosovo*, OSCE Report, September 2000, *supra* note 295 at 3.

<sup>412</sup> The conflict produced an estimated 800,000 refugees and 500,000 internally displaced persons. See, *Report of the Secretary-General of 12 July 1999*, *supra* note 107, para. 5.

<sup>413</sup> *Ibid.*, para 9 at 3.

<sup>414</sup> Strohmeyer, *supra* note 406 at 48.



process of building up its forces.<sup>415</sup> The limited capacity of the KFOR and the UNMIK Police in law enforcement made it possible to respond only to the most serious crimes. These circumstances explain the focus and the development of the judiciary and the police towards the resolution of criminal matters.

At the time of the UNMIK deployment, not only law enforcement institutions were not functioning, but the judicial system collapsed. Thus, the crucial link between law enforcement and the judiciary was broken. Even after the establishment of the Emergency Judicial System (EJS) the coordination between the courts and law enforcement organs was not very effective. The four provisional courts of the EJS were overloaded with work and were not able to hear the cases in a timely manner. Thus, more detainees were kept in custody for extended periods of time often without a possibility to challenge the lawfulness of their detention.<sup>416</sup> Moreover, there were hardly any mechanisms to monitor the fairness of procedures in the courts. For example, the Lawyers Committee for Human Rights reported that in many instances the release of the arrested was ethnically motivated or pressured by the KLA or other influential groups.<sup>417</sup>

Given the combination of the mentioned security challenges, the first task of the UNMIK was to create a police force and a court system of sufficient capacity to resolve numerous security concerns. At the same time, the procedure for their re-establishment had to include mechanisms providing for their legitimacy, impartiality and independence.

## **B. Institutional structure of the judiciary**

As I mentioned in the introduction, the institutional structure of the judiciary and of the police (composition and principles of their re-establishment) may be one of the factors that influences people's perception about these organs. I specifically look at the methods that the UNMIK employed in order to ensure multi-ethnicity of the judiciary and the police.

To understand the challenges of providing judicial protection in Kosovo, it is necessary to trace the stages of the development of the judicial system. Because the judiciary had to be

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<sup>415</sup> *Report of the Secretary-General of 12 July 1999, supra note 107, para. 6 at 2.*

<sup>416</sup> This question will be discussed in detail in section C of this Chapter.

<sup>417</sup> *A Fragile Peace: Laying the Foundations for Justice in Kosovo*, Report of the Lawyers Committee for Human Rights, October 1999, online: Lawyers Committee for Human Rights Homepage <http://www.lchr.org/pubs/kosovofull1099.htm> (date accessed: 20 May 2001).

established from scratch, initially, it was not able to function at full capacity, that is, to provide civil, criminal and constitutional adjudication.

The development of the judicial system and affiliated institutions in Kosovo took place in two stages – the establishment of the Emergency Judicial System and its further transformation into the Regular Judicial System. The Emergency Judicial System (EJS) had extremely limited functions and, basically, provided only immediate response to the deteriorating security situation. The Regular Judicial System (RJS) assumed wider functions of criminal and civil adjudication. Ultimately, with the adoption of the Constitutional Framework for Self-government in Kosovo preconditions were created for the development of constitutional adjudication. At each of the three stages, the judiciary provided different levels of protection for individuals – from very basic during the EJS to more comprehensive after the implementation of the Constitutional Framework.

### **1. Principles of re-establishing judiciary**

The international administration had to re-establish the judicial system from scratch. In the Report of 12 July 1999, the UN Secretary General defined the principles and stages of the reconstruction of the judiciary and related institutions in Kosovo. The major objective was to create “an independent, impartial, and multi-ethnic judiciary.”<sup>418</sup> The initial steps in this process included the establishment of a court hierarchy as well as the organs providing technical and administrative support to the courts. In particular, the institution-building priorities comprised re-establishment of the Supreme Court of Kosovo, which was abolished in 1991; re-establishment of the correctional system; revival of the Kosovo Bar Association; and establishment of a technical advisory commission on the administration of the judiciary and the prosecution service.<sup>419</sup>

### **2. Organs providing technical and administrative support to courts**

SCR 1244 has granted the international administration ample powers over the provincial affairs, including the authority to administer the judiciary.<sup>420</sup> This task is

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<sup>418</sup> *Report of the Secretary-General of 12 July 1999, supra note 107, para 66 at 10.*

<sup>419</sup> *Report of the Secretary-General of 12 July 1999, supra note 107, para 70-73 at 11.*

<sup>420</sup> *Ibid.*

cooperatively managed by two UNMIK pillars – the UN-led Civil Administration and the OSCE-led Institution-building pillar.

Both pillars established divisions specifically responsible for various aspects of judicial affairs. The OSCE Department of Human Rights and Rule of Law is responsible for monitoring, protecting and promoting human rights. It develops mechanisms to ensure that the police, courts, administrative structures operate in accordance with human rights standards.<sup>421</sup>

The three divisions of the Department of Human Rights are responsible for support of the judicial system. The Judicial Support Unit provides logistical and technical support to newly established courts in Kosovo. The Training Unit is responsible for running a Kosovo Judicial Institute.<sup>422</sup> The Legal System Monitoring Section (LSMS) oversees the functioning of the judicial system. The Monitoring Section plays a particularly important role in assessing the applicable law and overall functioning of the Kosovo courts. The LSMS consists of independent monitors who do not represent either the Civil Administration or any group or individual.<sup>423</sup> The Section regularly produces reports on the state of the judicial system in Kosovo and provides recommendations for its improvement.

The UN-led Judicial Affairs Office deals with the four core areas of judicial affairs: the administration of courts, prosecution and prisons; the development of legal policy; the review and drafting of the legislation; and the assessment of the quality of justice in Kosovo.<sup>424</sup>

In September 1999 the SRSG established a Technical advisory commission on the judiciary and prosecution service.<sup>425</sup> It includes 10 local and 5 international members appointed by the SRSG. The Commission assesses the needs of Kosovo in levels and

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<sup>421</sup> Annual Report on the OSCE Activities (2000), online: OSCE Homepage < [http://www.osce.org/docs/english/misc/anrep00e\\_activ.htm#Anchor-1-41834](http://www.osce.org/docs/english/misc/anrep00e_activ.htm#Anchor-1-41834) > (date accessed: 7 July 2001).

<sup>422</sup> *Ibid.*

<sup>423</sup> *Update on the Expiration of Detention Periods for Detainees*, LSMS Report No. 4, March 18, 2000, online: OSCE Homepage < <http://www.osce.org/kosovo/documents/reports/justice/> > (date accessed: 25 June 2001).

<sup>424</sup> *Report of the Secretary-General of 12 July 1999*, *supra* note 107, para 67 at 11.

<sup>425</sup> *Regulation on Recommendations for the Structure and Administration of the Judiciary and prosecution Service*, UNMIK/REG/1999/6, s.1, online: UN Homepage <http://www.un.org/kosovo/pages/regulations/reg6.html> (date accessed: 16 August 2001).

categories of judicial bodies and advises the SRSG on the structure and administration of the judiciary and prosecution in Kosovo.<sup>426</sup>

In March 2000 the SRSG established another structure for managing the judicial system and correctional service - the Administrative Department of Justice within the JIAS structure. It is responsible for the overall management of the judicial system and the correctional service.<sup>427</sup> It implements the guidelines provided by the IAC and gives recommendations to the IAC about the overall strategy in the development of the judicial system. Other responsibilities of the Department include cooperation with other departments and organizations on matters of the judicial system and correctional service, provision of courts with appropriate resources, assistance in training of judges, prosecutors, lawyers and other judicial personnel, internal prison inspection, etc.<sup>428</sup>

### 3. Emergency Judicial System

The Emergency Judicial System (EJS) of Kosovo was put in operation in June 1999 and ran its activities approximately until the end of 1999. The system had limited structure and exercised only minimal judicial functions. The EJS provided an immediate response to the deteriorating security situation in Kosovo. The main task of the EJS was to conduct pre-trial hearings of persons arrested by the KFOR. No civil hearings were held until spring 2000.<sup>429</sup> Given the limited functions of the EJS, it is reasonable to look at its contribution to minority inclusiveness mainly through its composition.

There were only four provisional district courts and prosecutors' offices set up in Pristina, Prizren, Mitrovica and Pec. The Pristina district court had mobile judicial units, which covered all other areas where courts were not set up.<sup>430</sup>

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<sup>426</sup> *Ibid.*, s. 1, 5.1.

<sup>427</sup> *Regulation on the Establishment of the Administrative Department of Justice*, UNMIK/REG/2000/25, s. 1.1.

<sup>428</sup> *Ibid.*, s.2.2.

<sup>429</sup> *The Development of the Kosovo Judicial System (10 June through 12 December 1999)*, LSMS Report, 17 December 1999, online: OSCE Homepage: <<http://www.osce.org/kosovo/documents/reports/justice/>> (date accessed: 25 July 2001) [hereinafter *Development of the Kosovo Judicial System*].

<sup>430</sup> *Criminal Justice System in Kosovo*, LSMS Report, July 2000, online: OSCE Homepage <[www.osce.org/kosovo/publications/law/crjustice.pdf](http://www.osce.org/kosovo/publications/law/crjustice.pdf)> (date accessed: 28 July 2001) [hereinafter *Criminal Justice System*].

Because at the time of the UNMIK deployment there was no functioning judiciary, the first task of the international mission was to select and appoint judges and prosecutors. Given the importance of such appointments for the future democratization in Kosovo, it was essential to tailor a transparent selection procedure, which would give legitimacy to the newly appointed courts.<sup>431</sup> The selection and appointment had to be based on fair criteria of experience, training and moral integrity of the candidates. Another two criteria kept in mind, were political acceptability of the candidates and ethnic balance within the re-established judicial system.<sup>432</sup>

The UNMIK established a special body – the Joint Advisory Council on Provisional Judicial Appointments (JAC) – to screen and select candidates for judicial positions. The main task of the JAC was to advise the SRSG on the matters related to the provisional appointment of judges, prosecutors and other judicial personnel.<sup>433</sup> As the EJS itself, the JAC was created as an organ of temporary nature. The duration of its existence was defined by two factors: the fulfillment of the purpose of its creation – advise the SRSG on appointments of the judicial personnel - and the establishment of a permanent commission for the selection of judges and prosecutors.<sup>434</sup> The initial term of the JAC members was limited to two months.

Like the majority of the UNMIK-created organs, the JAC included both local (4 members) and international (3 members) experts. The composition of the Council had to reflect ethnic diversity of the Province. It consisted of two Kosovo Albanians, one Bosniac and one Serb.<sup>435</sup> All the members were appointed by the SRSG.

The JAC was responsible for reviewing the applications from Kosovo legal professionals and making written recommendations to the SRSG on candidates for appointment to judicial office.<sup>436</sup> The SRSG had final authority to approve or reject a candidate recommended.

One of the major difficulties for the international administration was finding qualified candidates who were willing to apply for positions. Many Kosovo Albanian lawyers who

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<sup>431</sup> Strohmeyer, *supra* note 406 at 51.

<sup>432</sup> Strohmeyer, *supra* note 406 at 52.

<sup>433</sup> *On Joint Advisory Council on Provisional Judicial Appointments*, Emergency Decree 1999/1, art.1.

<sup>434</sup> *Ibid.*, art. 9.

<sup>435</sup> *The Development of the Kosovo Judicial System*, *supra* note 429.

were persecuted during the Serb regime had escaped before the deployment of the UNMIK. Those who left were considered collaborators of the Serb regime and their appointment was vigorously apposed by Kosovo Albanian political forces. A significant number of Kosovo legal professionals have not been practicing law and were not able to update their legal knowledge for almost a ten-year period.<sup>437</sup> In making appointments, the international administration had to maneuver between political considerations, professional requirements and the desire to achieve a certain ethnic balance within the judiciary. Given the limited number of candidates, this was a difficult task and many appointments were compromised in order to most fully meet the three objectives.

By the end of June 1999, the SRSG was able to appoint nine judges and prosecutors (among them three Serbs).<sup>438</sup> The judges and prosecutors of the Emergency Judicial System were appointed for a three-month renewable period.

Between June and September 1999 the SRSG appointed 55 judges and prosecutors.<sup>439</sup> Among them 42 were Kosovo Albanians, 7 Serbs, 4 Muslims, 1 Turk and 1 Roma.<sup>440</sup> All the appointees have previously served as judges and prosecutors, but most of them have not practiced law in the preceding ten years.<sup>441</sup> During July-October most of the Serb judges and prosecutors resigned because of the lack of security, discrimination and insufficient remuneration.<sup>442</sup> As a result, by mid-December 1999 only 47 judges and prosecutors remained in the system.<sup>443</sup>

The process of the formation of the EJS shows that two concerns of peace-building and consociationalism were attempted to be addressed: 1) legitimacy of the re-established judiciary and participation of the local parties in its re-establishment; and 2) inclusiveness of minority members in the judiciary.

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<sup>436</sup> *On Joint Advisory Council on Provisional Judicial Appointments*, *supra* note 431, art 6.

<sup>437</sup> *A Review of the Criminal Justice System (1 September 2000 – 28 February 2001)*, LSMS Report, March 2001, at 1, online: OSCE Homepage < <http://www.osce.org/kosovo/documents/reports/justice/> > (date accessed: 25 June 2001).

<sup>438</sup> *Criminal Justice System*, *supra* note 430.

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*

<sup>441</sup> *The Development of the Kosovo Judicial System*, *supra* note 428.

<sup>442</sup> *Ibid.*

<sup>443</sup> *Ibid.*

From the position of the peace-building criteria, the establishment of the JAC was important and necessary for the legitimate process of selecting judges. This organ assisted in the formation of a professionally qualified, impartial and diverse judiciary – a foundation for fair and equal treatment of defendants. In turn, fairness of court procedures raises the population's faith in the court system and the confidence of minority communities in being protected. The sense of protection and confidence of minorities in being treated fairly and impartially is a part of their general feeling of being included in a society and of being its free and equal members.

Given the difficulty of the post-conflict situation, the UNMIK may be regarded as having coped with the task of nominating a multi-ethnic judiciary sufficiently well. While at the stage of selection a lot of effort was dedicated to attracting applications from minority professionals, much less support was provided to help keep them in the system once nominated. The lack of such mechanisms was one of the reasons why many minority judges and prosecutors left the system. Thus, being initially quite diverse, the courts and the prosecutorial office have gradually lost the desired multi-ethnic characteristic.

#### **4.Regular Judicial System**

##### *a. Appointments*

By the end of 1999 and the beginning of 2000, the EJS had been gradually transformed into a regular judicial system. The regular judicial system contains not only a more elaborate judicial structure with wider functions, but also a new organ responsible for the selection of candidates for judicial appointments - an Advisory Judicial Commission (AJC).<sup>444</sup> In October 1999 the AJC replaced the JAC of the Emergency Judicial System. Similarly to the JAC, the Commission reviews applications, selects candidates and recommends them to the SRSG.

During November-December 1999 the AJC carried out the selection of candidates for judicial positions. Starting November 1999, the AJC received 700 applications and

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<sup>444</sup> *Regulation on Appointment and Removal from Office of Judges and Prosecutors*, UNMIK/REG/1999/7, online: UN Homepage < <http://www.un.org/peace/kosovo/pages/regulations/reg7.html> > (date accessed: 16 June 2001).

conducted approximately 560 interviews.<sup>445</sup> The AJC encouraged minorities to submit applications for judicial positions, but these efforts had limited success.

In December the AJC selected 301 professional judges, prosecutors and lay judges.<sup>446</sup> Initial swearing in was held in January 2000. A number of appointed judges and prosecutors, especially those from minority communities, did not attend the swearing in ceremonies. Among 301 appointed judges and prosecutors, only 245 judges and 42 prosecutors were actually sworn in.<sup>447</sup> Among them, only 8 were minorities, including Kosovo Serbs. Among 42 prosecutors, only 2 were representatives of minority communities. As of July 2000, 230 judges, 235 lay judges and 41 prosecutors worked in the system. Further appointments were made in August 2000.

With the adoption of Regulation 2000/34, the SRSG obtained power to appoint international judges and prosecutors.<sup>448</sup> As of September 2000, six international judges and two prosecutors were appointed.<sup>449</sup> The involvement of international judges and prosecutors is not a consociational technique. However, because of the objective sought through the assignment of international judges and prosecutors – fairness of procedure – it may be regarded as contributing to the protection and inclusiveness of minorities and, thus, supporting the important goals of peace-building.

#### *b. Structure of the regular judicial system*

District Courts were established in each of the five Kosovo regions: Pristina, Prizren, Pec, Gnjilane and Mitrovica. Now the majority of municipalities has a court of minor offences and a municipal court (See table 6). Compared to the rest of municipalities, the three predominantly Serb regions - Leposavic, Zubin Potok and Zvecan - have somewhat distinct court system. According to the OSCE Municipality Profiles,<sup>450</sup> by the summer of 2000, no legal courts functioned in those municipalities. However, former municipal courts and minor offences courts still existed. The municipal court in Leposavic was even funded by

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<sup>445</sup> *Criminal Justice System, supra* note 430.

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> International judges may be appointed to any court throughout Kosovo. They have the authority to select and take responsibility for new and pending cases in the court where they were appointed.

<sup>449</sup> *Criminal Justice System, supra* note 430.



Belgrade.<sup>451</sup> Although the judges in Leposavic and Zubin Potok were re-appointed, they did not swear in or otherwise officially assume their positions. The distinct character of the judicial system in Serb dominated municipalities and their maintained connection with Serbia strengthen the de facto division of Kosovo in predominantly Serb and predominately Albanian areas.

The jurisdiction of the Kosovo courts is differentiated. District courts adjudicate criminal cases that lead to a sentence of more than five years. Municipal courts adjudicate cases, which carry a sentence of up to five years. The minor offences' courts adjudicate cases that carry up to two months of imprisonment.<sup>452</sup> Although criminal matters remain an issue of primary concern, courts have also started adjudicating civil matters. For example, the municipal court in Klina deals with all civil cases, except divorces, which are dealt by the District Court.<sup>453</sup> The municipal court of Lipjan also deals with both criminal and civil cases.

At the Kosovo level, Pristina hosts the highest courts in the hierarchy: the Supreme Court of Kosovo, which is the highest appellate body, the Highest Court for Minor Offences and a Commercial Court.

The Supreme Court of Kosovo<sup>454</sup> was re-established by the UNMIK Regulation in September 1999. It has the powers of the Supreme Court, which exercised its jurisdiction in Kosovo before 1991, as regards appeals against decisions of district courts in criminal matters and detention terms.<sup>455</sup> The five judges of the Court are appointed by the SRSG, in consultation with the JAC.

**Table 6. Kosovo Courts**

Municipality	District Court	Municipal court	Court of minor offences	Prosecutor's office

<sup>450</sup> *Municipality Profiles*, online; OSCE Homepage < <http://www.osce.org/kosovo/documents/> > (date accessed: 10 July 2001).

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid.*

<sup>454</sup> Formally known as the Ad Hoc Court of Final Appeal.

<sup>455</sup> *Regulation on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor*, UNMK/REG/1999/5, s.1, online: UN Homepage < <http://www.un.org/peace/kosovo/pages/regulations/reg5.html> > (date accessed: 8 August 2001).

Dečan/Dečani		Yes 4 KA	yes	
Fushë Kosovë/Kosovo Polje		no plan for municipal court system; cases are dealt with by the Pristina courts		
Gjakovë/Gjakovica		Yes 7KA	Yes 5KA (4 women)	Yes 4 KA
Glogovac/Glogovica		Yes 5 KA	Yes 3 KA	
Gjilan/Gnjilane	Yes - 10 KA, 2 international judges	Yes 1 Turk	Yes 10KA	yes
Istog/Istok		Yes - all Kosovo Albanian	Yes - all Kosovo Albanian	
Klinë/Klina		Yes	Yes	
Ferizaj/Uroševac		Yes	Yes	Yes
Kaçanik/Kaçanik		Yes		
Leposaviq/Leposaviq		Yes 5 KS	Yes - all Kosovo Serbs	
Lipjan/Lipljan		Yes 4KA	Yes 3KA	
Malishevë/Mališev		Yes	Yes	
Mitrovica/Mitrovica	Yes	Yes	Yes	Yes

Novobërdë/Novo Brdo		no municipal court system; cases are handled by Pristina courts		
Obiliq/Obiliq		There has never been a court system in Obiliq since it became a separate municipality in 1990.		
Podujevë/Podujevo		Yes	Yes	
Prishtinë/Priština	Yes - all Kosovo Albanians	Yes - all Kosovo Albanians	Yes - all Kosovo Albanians	Yes - all Kosovo Albanians
Prizren/Prizren	Yes - 6KA, 1 Turk, 1 Roma, 1 Bosniac	Yes - 9KA, 1 Bosniac	Yes - 4 KA, 1 Turk	Yes
Rahovec/Orahovac		Yes 5KA	Yes - 3KS, 4KA	
Shtime/Štimlje		cases are dealt with by the Uroševac courts		
Skenderaj/Srbica				
Štrpce/Shtërpçë		no court system by summer 2000		
Pejë/Pejë	Yes	Yes	Yes	Yes
Suharekë/Suva Reka		Yes 5KA	Yes 6KA	
Viti/Vitina		Yes	Yes	
Vushtrri/Vuqitri		Yes	Yes	

Zubin Potok/Zubin Potok		Yes - All Kosovo Serbs	Yes	
Zvečan/Zvečan			Yes	

Source: OSCE Municipality Profiles.

As we can notice from the table, the Kosovo judiciary is predominantly Albanian. Among the municipalities only Prizren courts can be regarded as multiethnic. Their composition fairly reflects various ethnic communities of Prizren.

However, the general trend is that in predominantly Albanian municipalities (that is, the major part of Kosovo), an absolute majority of the judges are Albanian. In Serb-dominated municipalities courts are dominated by Serbs. Such ethnic composition creates doubts about the ability of those courts to be objective in deciding cases involving minorities in respective municipalities. As the illustrations from the practice of the Kosovo courts will show, these concerns have sufficient grounds.

At the level of the Kosovo Supreme Court, the High Court for Minor Offenses, and the Commercial Court all judges are Albanians. Taking into account the potential policy-making role of the highest courts, there may be serious concerns about the ability of purely Albanian courts to be sensitive enough to the needs of minorities. At this point, the courts' composition cannot be characterized as sufficiently contributing to the inclusiveness of minorities.

### *c. Constitutional framework*

As we already know,<sup>456</sup> the Constitutional Framework for Self-government of Kosovo established important guidelines for the further development of the institutions of self-government in the Province. According to it, the government in Kosovo will be exercised through three branches of government – the executive, the legislative and the judiciary. The intended judicial structure includes the Supreme Court of Kosovo, District Courts, Municipal Courts and Minor Offense Courts.<sup>457</sup> The international judges will continue to serve within the

<sup>456</sup> See Chapter III.

<sup>457</sup> *Constitutional Framework*, *supra* note 223, s. 9.4.4.

Kosovo judicial system according to the rules established by the SRSG.<sup>458</sup> The composition of the judiciary has to reflect the diversity of the people of Kosovo.<sup>459</sup> Interestingly, the Framework does not provide any guideline about what are the criteria to judge if the judiciary sufficiently reflects the diversity of the people of the Province and what standard should be applied to ensure such diversity.

Currently the administration of the judiciary is exercised by the SRSG and other organs of the international administration. As intended by the Framework, the Provisional Institutions of self-government will soon assume many of those responsibilities. In particular, they will be responsible for the organization and proper functioning of the courts; for maintenance of court and prosecutorial services; for appointing, training and disciplining members of judicial support staff; for coordination between the judicial system and the correctional service; for providing information and statistics relating to the functioning of the judicial system and correctional service, etc.<sup>460</sup> The Provisional Institutions will also have the power to decide on the appointment of judges and prosecutors.<sup>461</sup> Because the Framework refers to the Provisional Institutions in general, it is not clear which organs – the Assembly, the President, the Government or other organs – will be responsible for each of the mentioned matters.<sup>462</sup> In any event, one of these organs, most likely the Kosovo Assembly, will decide on judicial appointments and, thus, define the composition of the courts and the prosecutorial office. Because no special procedures and criteria are spelled out in the Framework, appointments are left to the political process, for the discretion of the majority vote. In such a situation, there exists a threat that the Albanian majority parliament will effectively resist the nomination of minority (first of all, Serbian) judges. Another problem may be the formation of monoethnic segments of the judiciary in particular territories of the Province – nomination of mostly Serbs in predominately Serb municipalities and mostly Albanians in predominantly Albanian areas.

At the same time, the SRSG retains powers over the judicial affairs, which he had according to the UNMIK Regulations. In particular, he decides on requests about assignment of

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<sup>458</sup> *Constitutional Framework*, *supra* note 223.

<sup>459</sup> *Ibid.*, s. 9.4.7.

<sup>460</sup> *Ibid.*, s.5.3

<sup>461</sup> *Ibid.*, s. 5.3 (a).

<sup>462</sup> For example, will the Assembly have power to appoint judges and prosecutors or will the Government be responsible for maintenance of courts and correctional service.

international judges or prosecutors and change of venue;<sup>463</sup> exercises control over law enforcement institutions and correctional service;<sup>464</sup> and exercises the final authority in regard to the appointment, dismissal and disciplining of judges and prosecutors.<sup>465</sup> According to section 9.4.8, judges and prosecutors will continue to be appointed by the SRSJ from the list of candidates proposed by the Kosovo Judicial and Prosecutorial Council and endorsed by the Assembly.

There seems to be a contradiction about the power of the SRSJ to appoint judges and prosecutors and power of the Provisional Institutions to make decisions on appointment of judges and prosecutors. "Making decisions" reasonably suggests competence to decide whether a candidate is appointed or not. However, as a result of section 9.4.8, the powers of the Assembly are limited to the endorsement of candidates only. This constitutes a controversially restricted interpretation of the powers of the Provisional Institutions, which potentially can impede the development of sustainable self-government and contradicts the principles of the peace-building concept.

The Framework affirms the right of individuals to judicial review of the legality of a decision of the Government or other executive agency.<sup>466</sup> This provision gives courts the power of constitutional adjudication. The provision does not specify the court in which an act can be challenged. We can assume that an application for review can be filed with a municipal or district court. This seems to be an implication for establishment of a decentralized system of judicial review characteristic of common law countries. Thus, the Kosovo courts at all levels can potentially be policy-makers. Then, the composition of the courts becomes even more important. Diverse backgrounds and affiliations of judges create an opportunity for them to examine issues from a variety of perspectives of its members, to be more flexible in choosing solutions and more successful in overcoming ethnic and other biases and stereotypes.

Unfortunately, the area of constitutional review in regard to an individual complaint is limited to the executive branch only. An individual cannot challenge either an act adopted by the

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<sup>463</sup> *Constitutional Framework*, *supra* note 223, s. 8.1(h). This power is spelled in more detail in the Regulation On Assignment of International Judges/Prosecutors and/or Change of Venue.

<sup>464</sup> *Ibid.*, s. 8.1(j).

<sup>465</sup> *Constitutional Framework*, *supra* note 223, s. 8.1(g).

<sup>466</sup> *Ibid.*

Kosovo Assembly or the actions and decisions of the UNMIK. Perhaps, the possibility to challenge legislative acts will be provided in the future.

The Framework also contains important foundations for the development of the Supreme Court's power of constitutional review and interpretation. This function is particularly important as a tool to resolve numerous contradictory provisions<sup>467</sup> in the Framework. The Framework confers on the Special Chamber of the Supreme Court powers to decide:

(a) At the request of the President of Kosovo, any member of the Presidency of the Assembly, any Assembly Committee, no fewer than five members of the Assembly, or the Government, whether any law adopted by the Assembly is incompatible with this Constitutional Framework, including the international legal instruments specified in Chapter 3 on Human Rights;

(b) In the event of disputes between or among Provisional Institutions of Self-Government, or between a Provisional Institution of Self-Government and an Assembly Committee, one or more members of the Presidency of the Assembly, or one or more members of the Assembly on the extent of their rights and obligations under this Constitutional Framework;

(c) At the request of any independent body or office referred to in Chapters 10 and 11, whether a decision of a Provisional Institution of Self-Government infringes upon the independence and responsibilities of the relevant independent body or office; and

(d) At the request of the Office of the Public Prosecutor, whether an act by a member of the Assembly, a member of the Government or the President of Kosovo constitutes an official act and as such is covered by immunity under this Constitutional Framework.<sup>468</sup>

As one can notice, the Chamber has power of judicial review and interpretation only in relation to the Provisional Institutions. Nothing in the Framework suggests that the Chamber can decide on the scope of the SRSG competence or resolve controversies regarding the competency of the SRSG and the Provisional Institutions. At the same time, the Framework contains sufficient grounds to suggest that the SRSG has authority to resolve such disputes. According to the Framework, the SRSG oversees the Provisional Institutions and can take measures if the actions of the Institutions are inconsistent with SCR 1244 or the Framework. Definition of

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<sup>467</sup> See, discussion in Chapter III, section B(1).

<sup>468</sup> *Constitutional Framework*, supra note 223, s. 9.4.11.

consistency with the Framework presupposes the power to interpret the Framework's provisions, including those relating to the power of self-government and the SRSG.

Another question is whether the authority of the SRSG goes as far as judging on the compatibility of the Chamber's action with the Framework. Such a case may, for example, include a situation in which the Chamber has allegedly exceeded the limits of its constitutional jurisdiction.

### **Interim conclusion**

In less than a year, the UNMIK managed to resurrect the Kosovo judiciary. The re-establishment of the judiciary is itself a significant achievement. However, the judiciary will advance the long-term goals of peace-building only if it provides fair and impartial hearings and an equal protection for all minority and majority members.

The development of the judiciary was achieved through several stages starting from the limited functions of the Emergency Judicial System to prospective constitutional adjudication. At each stage the international administration sought to tailor the transparent and objective process for the selection of judicial personnel. The purpose of such a process is to guarantee the legitimacy of the re-established organs and develop the credibility of the system with the population. (Unfortunately, the intention of creating a multi-ethnic judiciary have not been fully reached in practice.) The UNMIK also gradually created preconditions to allow the court system to function at full capacity, that is, to provide not only civil and criminal, but also constitutional adjudication. The adoption of the Constitutional Framework served a serious step in the expansion of the courts' role to the area of constitutional adjudication – a field crucially important for the development of individual and collective rights and clarifying checks and balances within the self-government. The expansion of the role of the judiciary to the area of constitutional adjudication is an important precondition for a fuller role of the courts on consociational government. When courts exercise only criminal adjudication, the inclusiveness is provided mainly through the composition and fair application of law to all defendants. Constitutional adjudication provides the policy protection for whole communities.



### **C. Law and Its Application in Kosovo**

The structure and the composition of the courts is one factor which influences people's perceptions about the justice system and their expectations of such system. Another, even more important, factor is law and its actual application by the courts. Because the major focus of the court proceedings in Kosovo is the trial of criminal cases, I will concentrate on legal guarantees for criminal defendants. In particular, I will look at the three most important rights of the detained and accused – the right to challenge the lawfulness of detention, the right to defense counsel and the right to a fair trial.

#### **1. General characteristic of the applicable law**

SCR 1244 does not expressly address the issue of the law applicable in Kosovo, but it confers on the international administration all the legislative and executive authority in the Province.<sup>469</sup> The provisions of the Resolution were further spelled out in the Report of the UN Secretary-General on the United Nations Interim Administration in Kosovo. The Report stipulated for the precedence of human rights standards and regulations of the SRSG over the laws of the FRY and the Republic of Serbia. The UNMIK respects the laws of the FRY and of the Republic of Serbia "insofar as they do not conflict with internationally recognized human rights standards or with regulations issued by the SRSG."<sup>470</sup> The SRSG may "change, repeal, or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration."<sup>471</sup>

After the deployment, one of the first steps of the international administration was to define what law was applicable in Kosovo. On 25 July 1999 the SRSG issued Regulation 1999/1, which provided that the law applicable in Kosovo will be "laws applicable in the territory of Kosovo prior to 24 March 1999" insofar as they do not contradict the international human rights standards.<sup>472</sup> The practical reasons for such a decision were, first, to avoid a legal vacuum at the initial stage of the transitional administration; second, to avoid

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<sup>469</sup> *Report of the Secretary-General of 12 July 1999, supra note 107, para 34.*

<sup>470</sup> *Ibid.*, para 35.

<sup>471</sup> *ibid.*, para 39.

the need for local lawyers to be introduced into entirely new legal standards which local professionals did not know.<sup>473</sup>

As noted before, the main laws that were applied by courts during the first month of the international administration in Kosovo were criminal laws and rules of criminal procedure. The law applicable according to Regulation 1999/1 included the FRY Criminal Code, the Socialist Federal Republic of Yugoslavia Criminal Code, and the Socialist Yugoslav Republic of Serbia Criminal Code. The Kosovo judges and prosecutors willingly conducted proceedings under the FRY Criminal Code and the Socialist Federal Republic of Yugoslavia Criminal Code, which were both in force before Kosovo was deprived its autonomous status.<sup>474</sup> The Socialist Yugoslav Republic of Serbia Criminal Code, which replaced the Kosovo Penal Code (KPC) after Kosovo became a part of Serbia, was regarded by Kosovar judges and prosecutors as “Serbian” discriminatory law and was associated with the Milosevic regime.<sup>475</sup> Consequently, many of them refused to apply the Socialist Yugoslav Republic of Serbia Criminal Code and applied the KPC instead.<sup>476</sup> This situation is a very vivid illustration of the influence of psychological factors on professional behaviour. Interestingly, the KPC and the Serbian Code are similar in many respects,<sup>477</sup> but their value for the judiciary is measured not by the content, but by their symbolic connection to the “statehood” of Kosovo.

The unsanctioned application of the KPC had a negative impact on the legality of proceedings and respect for the rule of law. In December 1999, the SRSG promulgated Regulation 1999/24<sup>478</sup> (later amended by Regulation 2000/59), which repealed Regulation 1999/1 and reinstated the laws applicable during the time of the Socialist Autonomous Province of Kosovo.

Currently the law in Kosovo is comprised of the following sources:

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<sup>472</sup> *Regulation on the Authority of Interim Administration in Kosovo*, UNMIK/REG/1999/1, online: UN Homepage <http://www.un.org/peace/kosovo/pages/regulations/reg1.html> (date accessed: 19 May 2001).

<sup>473</sup> Strohmeyer, *supra* note 406 at 58.

<sup>474</sup> *Criminal Justice System*, *supra* note 430.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid.*

<sup>478</sup> *Regulation on the Law Applicable in Kosovo*, UNMIK/REG/1999/24, online: UN Homepage <http://www.un.org/peace/kosovo/pages/regulations/reg24.html> (date accessed: 20 April 2001).

- regulations promulgated by the SRSG;
- the law in force in Kosovo on March 22 1989;
- the law on force in Kosovo between March 22, 1989 and June 10, 1999 (the date when Regulation 1999/24 is deemed to enter into force): if a subject matter is not covered by UNMIK Regulation, or the law in force on 22 March 1989, but is covered by the law in force after 22 March 1989, courts can apply that law given that it is not discriminatory and complies with the international human rights standards;
- international human rights standards.<sup>479</sup>

All persons undertaking public duties and holding public offices in Kosovo are bound by international human rights standards that are reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on Elimination of All Forms of Discrimination Against; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and the International Convention on the Rights of the Child.<sup>480</sup>

Regulation 1999/24 sets out only basic guidelines about applicable law, leaving several points unclear. First, it does not answer the question whether the UNMIK Regulation or law in force in Kosovo take precedence over one another if they both regulate the same matter and both are consistent with human rights standards. Second, the Regulation does not specifically spell out the laws or identify the elements, which are inconsistent with human rights standards.<sup>481</sup> Rather, it places the burden of interpretation on local lawyers who are usually unfamiliar with human rights law.<sup>482</sup> Human rights law has never been applied in Kosovo before. The use of the case law, which serves as a guideline for the practical application of human rights standards, is unknown. The Supreme Court of Kosovo have not yet assumed powers under the Constitutional Framework, which would allow it to provide

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<sup>479</sup> *Ibid.*, s.1-3.

<sup>480</sup> *ibid.*, s. 1 (3).

<sup>481</sup> Strohmeier, *supra* note 406 at 59.

<sup>482</sup> *Ibid.*

guidance about the applicability of constitutional standards in Kosovo. These ambiguities impede the ability of the Kosovo courts to apply laws effectively.

## **2. Guarantees of the ECHR and the ICCPR**

Criminal matters were and are the major concern for the Kosovo courts. In this respect, particular attention should be drawn to the human rights standards in relation to trials and detention. Among the conventions applicable in Kosovo, the ECHR and the ICCPR contain the most comprehensive list of guarantees for fair criminal procedures. The relevant international standards are spelled out in Articles 9, 10, 14 of the ICCPR and Articles 5,6 of the ECHR. The right to challenge the lawfulness of detention, the right to defense counsel, and the right to fair trial are the core guarantees for fairness and non-arbitrariness of the criminal proceedings. Let us briefly review these guarantees and their enforcement.

As I pointed out before, I do not seek to analyze the applicable law in great detail. Rather, I use the content of the regulation and instances of their misapplication to highlight the areas of concern in the development of a legal framework for Kosovo and the treatment of minorities.

### *a. Right to challenge lawfulness of detention*

The ICCPR, the ECHR and the Yugoslav domestic law contain special guarantees against arbitrary detention. According to Article 9(1) of the ICCPR and Article 5(1) of the ECHR everyone has a right to liberty and security. No one can be deprived of his liberty except on the grounds and according to procedures established by law.<sup>483</sup> Further, both Conventions provide for the right of detained persons to challenge the lawfulness of their detention.<sup>484</sup> The right to review the ordered detention is a limitation on state authorities to ensure that detention is absolutely necessary for effective exercise of the criminal

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<sup>483</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S.171, Can. T.S. 1976 No.47, 6 I.L.M. 368, art. 9(1) (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter I.C.C.P.R.].

<sup>484</sup> *Ibid.*, art. 9(3).

proceedings, that trial takes place within a reasonable time and the investigation is conducted with expedition.<sup>485</sup>

The FRY Code of Criminal Procedure provides that within 24 hours of detention, a judge must deliver a decision to a detainee whether he is to be held in custody. In extraordinary circumstances a detainee may be kept for 72 hours before a judicial review. According to Article 182 (1) of the FRY Law on Criminal Procedure (LCP), pre-trial custody may be ordered as a special measure to guarantee the presence of a defendant and the successful exercise of the proceedings. In particular, under Article 197 of the FRY Code of Criminal Procedure (CCP), a judge can order a one-month pre-trial detention. Further, a panel of judges may extend detention to a maximum of 2 months.<sup>486</sup> In proceedings where a defendant is charged with a crime carrying a sentence of more than five years of imprisonment, the Supreme Court of Kosovo may extend pre-trial custody for up to three months. Thus, according to Article 197, the maximum period of pre-trial detention will be 6 months.<sup>487</sup>

UNMIK Regulation 1999/26 allows further extension of pre-trial detention. On recommendation of an investigating judge or prosecutor, the Ad Hoc Court of Final Appeal can extend pretrial custody by three months, with a subsequent extension of no more than three months.<sup>488</sup> Thus, if extensions under both Article 197 of the FRY CCP and under Regulation 1999/26 are applied, a person may spend in total one year in pre-trial detention.

According to the findings of the OSCE Legal Monitoring Section, orders to release suspects or to hold them in custody are often motivated by ethnic considerations.<sup>489</sup> The biased application of law is most frequently targeted at Kosovo Serbs. On many occasions Kosovo Serbs were treated in a stricter way than Kosovo Albanians. For example, several Kosovo Albanians and Kosovo Serbs were suspected of involvement in the murder of a Kosovo Albanian. Pending investigation, Kosovo Serbs were detained, while all Albanians

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<sup>485</sup> *Neumeister v. Austria* (1979-80), online: European Court of Human Rights Homepage < <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1014221939&Notice=0&Noticemode=&RelatedMode=0> > (date accessed: 3 May 2001).

<sup>486</sup> *Criminal Justice System*, *supra* note 430.

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*

<sup>489</sup> *The Treatment of Minorities by the Judicial System*, OSCE Report, August 1999 – March 2000, online: OSCE Homepage < <http://www.osce.org/kosovo/documents/reports/justice/> > (date accessed: 23 June 2001).

were released.<sup>490</sup> Given the fact that at that time no fact-finding had been carried out and all participants were equally under suspicion, there was no justifiable reason to release Kosovo Albanians and detain only Kosovo Serbs. This gives rise to the conclusion that the detention was ethnically motivated.

Other cases demonstrate that Kosovo Serbs were detained even when there was insufficient evidence of their involvement,<sup>491</sup> while no detention of Kosovo Albanians was ordered notwithstanding compelling evidence of their involvement in crime.<sup>492</sup>

Because pre-trial detention may often become a tool of ethnic persecution, it is particularly important that detainees have a right to challenge the lawfulness of detention. While Article 197 spells out the right of a detained for review at each instance of the custody extension, Regulation 1999/26 does not stipulate such a right. It can, thus, be asserted that habeas corpus procedures will not be available to detainees whose custody was extended under the Regulation. The question is whether Regulation 1999/26, which fails to provide a right to challenge the lawfulness of detention, should be regarded as unlawful or whether the standards of the ICCPR and the ECHR apply regardless of the wording of the Regulation. The OMIK Legal Monitoring Section has dedicated two reports to the analysis of Regulation 1999/26 and its application. The Section declared this Regulation to be unlawful and recommended its amendment.<sup>493</sup> Some Kosovo courts adopted another approach. For example, the Gnjilane District Court established that the ECHR gives courts authority to hear the challenges of pre-trial detention.<sup>494</sup>

Adoption of Regulation 1999/26 is an interesting example of the international administration trying to balance the demands of an emergency situation and legality of court proceedings. On the one hand, pre-trial detentions may be necessary for quicker restoration of law and order. The few courts of the Emergency Judicial System would have not been able to cope with hearing numerous challenges on detention. Thus, from a practical point of view,

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<sup>490</sup> *Criminal Justice System*, *supra* note 430.

<sup>491</sup> In one of the cases neither of the witnesses was able to identify the suspect (Kosovo Serb) as a man who they saw committing a crime. Nevertheless, he was put in custody. *The Treatment of Minorities by the Judicial System*, *supra* note 489.

<sup>492</sup> According to the OSCE Report, compelling evidence was presented to a judge concerning a Kosovo Albanian suspected in kidnapping two Kosovo Serb teachers, but the judge found no reason to hold the suspect in custody. *Ibid.*

<sup>493</sup> *Criminal Justice System*, *supra* note 430.

<sup>494</sup> *Ibid.*

the reason for introducing pre-trial detention without habeas corpus procedures is understood. At the same time, these practical considerations cannot justify derogation from human rights standards.

The indirect impact of the insufficient enforcement of the right to challenge the lawfulness of detention, first of all, will result in disbelief of the population in the fairness of the judicial system. For many minorities, this will be one of the many instances of discrimination that contributes to the general sense of instability and lack of protection and will defeat the objective of inclusive government.

*b. The right to defense counsel*

Among the minimum standards for treatment of suspects and detainees, the ICCPR and the ECHR stipulate for a right to legal assistance.<sup>495</sup> According to the case law of the European Court of Human Rights, states are under a positive obligation to provide effective legal assistance.<sup>496</sup> This assistance has to be qualified and experienced.<sup>497</sup> Adequate time and facilities have to be provided for the preparation of a defense.<sup>498</sup>

The OMIK legal monitors have revealed that in practice these guarantees are not observed properly. Having interviewed 198 detainees in five Kosovo regions, the monitors found out that none of them had access to defense counsel while in detention before the first detention hearing.<sup>499</sup> For Kosovo Serb detainees the problem is exacerbated by several factors. There are few Serb lawyers available to take court appointments.<sup>500</sup> Courts also often fail to appoint Serb lawyers even if they are available. In some Kosovo regions, the security situation does not allow Serb lawyers to travel to detention facilities to meet their clients.<sup>501</sup>

<sup>495</sup> I.C.C.P.R., *supra* note 483, art. 14(3).

<sup>496</sup> *Artico v. Italy* (1974), online: European Court of Human Rights Homepage < <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1014222249&Notice=0&Noticemode=&RelatedMode=0> > (date accessed: 3 August 2001).

<sup>497</sup> *Biondo v. Italy* (1983), online: European Court of Human Rights Homepage (date accessed: 3 August 2001).

<sup>498</sup> *Can v. Austria* (1981), online: European Court of Human Rights Homepage < <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1014222642&Notice=0&Noticemode=&RelatedMode=0> > (date accessed: 3 August 2001).

<sup>499</sup> *Access to Effective Counsel*, LSMS Report No.7, May 2000, at 6, online: OSCE Homepage < <http://www.osce.org/kosovo/documents/reports/justice/> > (date accessed: 23 June 2001).

<sup>500</sup> *Ibid.*

<sup>501</sup> *The Treatment of Minorities by the Judicial System*, *supra* note 489.

In respect to available Albanian lawyers, there is significant criticism about their ability to do their best as defense counsels for Kosovo Serbs.

Many detainees complained about the ineffectiveness of defense counsels. In particular, detainees reported that they were rarely visited by counsel during the investigation stage; that counsel's visits were 10-15 minutes long, which does not allow detailed discussion of their case; and that they were not kept informed about the course of the investigative proceedings, etc.<sup>502</sup> The confidentiality of the communications between detainee and a defense counsel was often violated. 23 out of 35 detainees in Gnjilane reported that their meetings with defense counsel took place in the presence of a detention facility representative.<sup>503</sup>

There can be many more examples of poor observation of a right to legal assistance. The main point here is that necessary guarantees are incorporated into the applicable law, but courts and the international administration are not doing enough to provide their appropriate enforcement.

### *c. The right to fair trial*

Article 6 of the ECHR and Article 14 of the ICCPR guarantee a right to a fair trial. According to Article 6 of the ECHR, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>504</sup> The right to a fair trial comprises two sides – fairness of procedure and impartiality and independence of a tribunal.

In a post-conflict society, concerns about the impartiality of courts are raised by a number of factors. First, being subject to threats and intimidation,<sup>505</sup> judges and prosecutors may often ignore the interests of justice in order to protect their own well-being. Second, many current judges and prosecutors have directly or indirectly suffered from the brutality of the Serb regime and, thus, may seek "redress" through applying more severe measures to Serbs. Under these circumstances the impartiality standards may arguably be violated, for

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<sup>502</sup> *Ibid.*, at 4-5.

<sup>503</sup> *Ibid.*, at 4.

<sup>504</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 October 1950, online: Council of Europe Homepage < <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> > (date accessed: 27 July 2001).



example, in cases where a mono-ethnic tribunal tries a member of minority community.<sup>506</sup> Let us look at the case of Bozur Bisevac and Miroslav Vuckovic, which involved an issue of impartiality.<sup>507</sup> Bisevac and Vuckovic are two Kosovo Serbs indicted for genocide. The defense counsel applied for the exclusion of the judging panel, inter alia, on the grounds of failure to guarantee panel's impartiality. The defense argued that the judges could not be impartial in the case because they all were Kosovo Albanians – members of the same ethnic group, which the defendants have allegedly tried to destroy. The defense also stated that the presiding judge could have been regarded as an “injured party” because his office and home had been burned during the conflict. This case demonstrates that the composition of a court shapes the people's perception about that court as either likely to be biased or likely to be more impartial.

The international administration established a special mechanism - assignment of international judge or prosecutor and change of venue – to ensure fairness and impartiality of proceedings.

Regulation 2000/64 allows for a change of venue of the criminal proceedings and for an assignment of an international judge or prosecutor in a case.<sup>508</sup> To ensure independence and impartiality of the court, a prosecutor, an accused or a defense counsel can petition the Department of the Judicial Affairs about the assignment of a judge or prosecutor or for a change of venue.<sup>509</sup> Petitions can be submitted at any time during the proceedings. On the basis of the petition or on its own motion, the Department of Judicial Affairs submits a recommendation to the SRSG for the assignment of international judges/prosecutors or/and change of venue. The Regulations does not establish a time frame for the Department of the Judicial Affairs to proceed with the petition. This creates a danger that issues will not be resolved in timely manner.

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<sup>505</sup> See, *Criminal Justice System*, *supra* note 429 at 47.

<sup>506</sup> *Ibid.*

<sup>507</sup> *Criminal Justice System*, *supra* note 429.

<sup>508</sup> *Regulation on Assignment of International Judges/prosecutors and/or Change of Venue*, UNMIK/REG/2000/64, s.1.1, online: UN Homepage <<http://www.un.org/peace/kosovo/pages/regulations/reg064.html>> (date accessed: 28 July 2001).

<sup>509</sup> It is not clear what criteria should be used to decide when the fair administration of justice needs the assignment of an international judge or prosecutor. Trial records are not a reliable source of information about the fairness of procedure because trial records reportedly lack accuracy and precision. - *Criminal Justice System*, *supra* note 429.

The SRSG has authority to approve or reject the recommendation. The SRSG assigns an international investigating judge and/or a panel composed of at least two international judges, one of which should be presiding judge.<sup>510</sup> This way a trial is conducted by a majority international panel that provides a sufficient guarantee for the proper administration of justice. The greater involvement of international judges and prosecutors in adjudication is a significant development to prevent actual or perceived bias against Kosovo ethnic minorities, especially Serbs. At the same time, it should be borne in mind that using international judges and prosecutors is not a consociational technique and it even to certain extent increases the dependence of the Kosovo judiciary on the outside interference. Nevertheless, I think that such a measure is justifiable at least during the first years of the Kosovo reconstruction.

### **Interim conclusion**

The re-establishment of the judiciary and its supportive structures falls within the necessary task of institution-building. As an integral element of peace-building, the re-establishment of the judiciary and the delimitation of the applicable law are directly subject to the constraints and requirements of the peace-building concept. The concept, however, does not provide any specific guidelines for the establishment of the judiciary. In this respect, the central test of the “correctness” of the international activities for the administration of the judiciary is whether the judicial reforms advance the two main goals of peace-building – transformation and sustainability. If courts come to be viewed as legitimate fora for the resolution of disputes, more people may prefer to resort to adjudication instead of nursing an ethnic grievance or resolving a matter through violence.<sup>511</sup>

The analysis of the Kosovo judiciary can be conducted in two dimensions: 1) the vertical dimension of the administration of justice – a test of compliance with the characteristics of peace-building; 2) the horizontal dimension of the structure and operation of the judiciary itself – a test to what extent the principles of consociationalism are incorporated in the judicial structure.

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<sup>510</sup> *Regulation on Assignment of International Judges/prosecutors and/or Change of Venue, supra* note 508, s. 2.1.

<sup>511</sup> Jennifer Widener, “Courts and Democracy in Post-conflict Transitions: A Social Scientist’s Perspective on the African Case” (2001) 98 AJIL 64 at 70.

1) All key appointments and decisions in regard to the administration of justice continue to emanate from the SRSG. He appoints judges and prosecutors, decides on the change of venue and assignment of international judges or prosecutors, and exercises authority over law enforcement and correctional services. Moreover, the authority to “ensure full implementation of the UNSCR 1244”<sup>512</sup> gives him almost unlimited power over any branch of the local government. The SRSG cannot interfere with the very exercise of justice, but he can influence the work of the courts through defining applicable law and making appointments. Generally speaking, this influence of the SRSG is unavoidable because all the power of the UNMIK is concentrated in his hands. Theoretically, the SRSG does not prejudice the work of the courts through his indirect influence and does not break the limits of the peace-building concept unless he sets up standards of treatment that promote ethnic discrimination.

From the practical perspective, the approach of the UNMIK to the administration of judicial affairs reveals a somewhat contradictory trend. On the one hand, the international administration tends to retain control over the administration of the judicial system. On the other hand, the international administration does not use its power effectively enough. For example, the UNMIK Regulations about applicable law and procedure often lack clarity. The UNMIK is not able to ensure that law enforcement organs fully comply with human rights standards.

2) The horizontal level – the structure and functioning of the judiciary itself. The functioning of the courts has far reaching direct and indirect impact on the state of affairs in the Province. First, through the protection that the courts provide to individuals. Second, through their institutional structure (first of all, multi-ethnic composition) and equal treatment of defendants of different ethnicity, courts can indirectly contribute to the inclusiveness of minorities in social and political life. This, in turn, could facilitate the meaningful participation of minorities in government and social life and lead to the mitigation of ethnic tension and majority rule.

Three major factors shape the contribution of the courts to minority inclusiveness: 1) the institutional structure – whether minorities are included in the system, whether reasonable effort is made to facilitate their inclusion; and how minorities are treated within the system;

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<sup>512</sup> Security Council Regulation 1244, *supra* note 106.

2) the applicable law – whether there are special mechanisms that protect defendants from judicial bias based on ethnicity; 3) and how courts apply the law – whether courts are actually biased in the application of general standards of treatment to defendants of various ethnic affiliation.

These three factors influenced the protection of minorities in Kosovo in the following way:

1) The institutional structure. From the very start of its activities in Kosovo, the UNMIK emphasized its commitment to establishing multi-ethnic judiciary. Both during the Emergency Judicial System and Regular Judicial System, the UNMIK bodies made reasonable efforts to facilitate inclusion of minorities in the system and were conscious of ethnic factor during selection and appointment of judges and prosecutors. The Commissions on Judicial Appointments invited applications from minorities and encouraged their participation in the re-established judiciary. However, the UNMIK was not able to hold minority judges and prosecutors in the system. Many newly appointed minority judges and prosecutors resigned because of discrimination within the judiciary, intimidation and other security concerns. As a result, currently the absolute majority of judges and prosecutors are Kosovo Albanian. We have already demonstrated that this composition of the judiciary may partially account for the perception of the judiciary as biased and ineffective. Thus, from the point of view of the institutional structure, there are certain concerns about the ability of the Kosovo judiciary to provide impartial trial and equal protection to representatives of all ethnic communities.

2) The applicable law. From a theoretical perspective, the law applicable in Kosovo contains all the minimum guarantees for fair and equal treatment of detainees and suspects. Special mechanisms are introduced to combat ethnic bias (e.g., the UNMIK Regulation on assignment of international judges and prosecutors and/or change of venue). At the same time, some regulations are not sufficiently clear and are even contradictory to human rights standards. Their ambiguous and arbitrary nature results in additional problems in their application.

3) The application of the law. The OMIK Monitoring Section reported instances when application of the law was inconsistent with human rights standards. Both the general misapplication of law and biased treatment of minority victims and defendants took place.

The most widely spread discrimination is observed in relation to Kosovo Serbs. The discrimination takes place in several forms. For example, officials are reluctant to punish Albanians for crimes committed against Serbs; Serbs receive more severe punishment than Albanians for the same offences.<sup>513</sup>

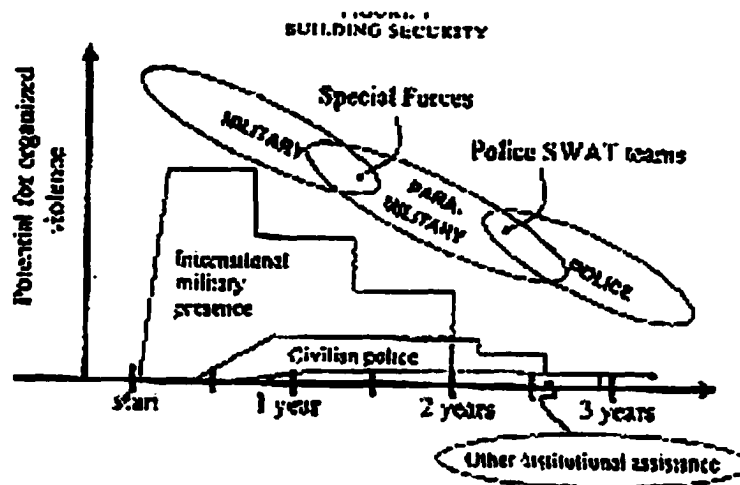
Currently, neither the composition of the courts nor the treatment of defendants by courts can be regarded as contributing to the protection and inclusiveness of minorities. The techniques applied to the re-establishment of the judiciary were consociational in character, but their implementation fell short providing a consociational result. Rather, the practice of the courts contributes to the general picture of discrimination of minorities. The judicial bias and lack of protection facilitate dissatisfaction of minorities with their position and are likely to intensify their political struggle for inclusion or even raise claims for separation.

#### **D. Police**

The restoration and maintenance of order is one of the necessary tasks of international missions in post-conflict zones. Immediately after the deployment, control over the security situation is usually carried out by the military as well as the police. As a rule, the normalization of the security situation takes several stages (See picture 3). At the very beginning, military troops intervene to stop hostilities and separate the warring parties. Once violence is brought under control, the involvement of the military decreases and security responsibilities are gradually transferred to the police force. The transfer from the military monitoring to civil policing can take several years, especially if an international mission has to re-establish the police structure.

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<sup>513</sup> *Assessment of the Situation on Ethnic Minorities in Kosovo*, OSCE Report, October 2000, at 12, online: OSCE Homepage < <http://www.osce.org/kosovo/documents/reports/minorities/> > (date accessed: 12 May 2001).



**Picture 4. Stages of security building in post-conflict societies.** Source: Tom Woodhouse & Oliver Ramsbotham, *Peacekeeping and Conflict Resolution* (Portland, OR : Frank Cass Publishers, 2000) at 83.

Providing law enforcement in post-conflict societies is a relatively new task for international administrations. Traditionally, peacekeepers relied on existing police structures. However, in Kosovo, the Yugoslav and Serb police forces were withdrawn and no law enforcement structure existed at the time of the UNMIK and KFOR deployment. The international administration had to assume responsibility, not only for a short-term task of providing public security, but also for the establishing local police structures.

### **1. Police structure**

The police and security function in Kosovo is exercised by several institutions. According to SCR 1244, both the international security presence (KFOR) and the international civil presence (UNMIK) have responsibilities regarding public safety, law and order. Following the cessation of the NATO bombing the KFOR, as a military force, took the lead in the security area. According to SCR 1244, it was responsible for ensuring withdrawal of the FRY military and police; for the demilitarization of the KLA; for the establishment of a secure environment for returning refugees; for ensuring public safety until the civil presence would be able to take responsibility for this task; for conducting border monitoring,

etc.<sup>514</sup> After minimal order was established, the UNMIK could take over the responsibility for the policing of the Province.

The UNMIK responsibilities include maintaining civil law and order and establishing local police forces.<sup>515</sup> In particular, the UNMIK Police carries out investigations, undertakes street patrols, maintains public order, and polices borders. In addition to that, it provides security escorts for money transfers, public transport, courts, judicial personnel, members of minority communities. It is primarily responsible for criminal investigations.<sup>516</sup>

The KFOR and the UNMIK Police are composed from the international contingent, which bears the primary responsibility for the maintenance of law and order in the Province. However, as an integral part of the process of institution-building, the UNMIK also initiated the formation of locally composed security structures. In addition to the UNMIK Police, the international administration established two Kosovar structures – the Kosovo Police Service (KPS) and the Kosovo Protection Corps (KPC) - that assist the maintenance of security and order in the province.

The KPS is a special sub-section of the UNMIK Police. According to the Constitutional Framework, the KPS functions under the authority of the SRSG.<sup>517</sup> The main objectives of the Service is crime prevention, public protection and safety maintenance. With time, the KPS is supposed to assume additional responsibilities in the area of law and order.

The recruitment to the KPS is exercised with consideration of demographic criterion. The policy is to include 15% representation by minorities in Kosovo Police Service. Women constitute about 25% of the recruits.<sup>518</sup> The Kosovo Police Service also provides employment for qualified members of the KLA who constitute about 50-55% of the recruits.<sup>519</sup>

Another structure that provides employment for the former KLA members is the Kosovo Protection Corps (KPC). According to the terms of the KLA demilitarization, the KLA was transformed into a civilian agency charged with providing emergency response and

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<sup>514</sup> Security Council Resolution 1244, *supra* note 106, para 9

<sup>515</sup> *Ibid.*, para 11(i).

<sup>516</sup> *UNMIK Police*, online: UN Homepage <http://www.un.org/peace/kosovo/pages/inmik12.html> (date accessed: 15 June 2001).

<sup>517</sup> *Constitutional Framework*, *supra* note 223, ch.6.

<sup>518</sup> *Ibid.*

<sup>519</sup> *Ibid.*

assistance in reconstruction services in Kosovo.<sup>520</sup> The KPC operate under the authority of the SRSG. Its day-to-day operation is directed by KFOR according to the guidelines of the SRSG.<sup>521</sup> The SRSG has final authority over the selection (10% of the members have to be from minority communities), appointment and dismissal of the members of Kosovo Corps.

The KPC does not have any role in law enforcement or maintenance of law and order.<sup>522</sup> It provides disaster response, performs search and rescue, demining and assists the reconstruction of public utilities and other social projects.<sup>523</sup> Only a limited number (200) of the KPC is authorized to carry weapons.

According to the OSCE Report of June-July 2000, almost every Kosovo municipality hosted brigades of the KFOR, the UNMIK Police, the KPC and the KPS. (see, Table 7).

**Table 7. International police and military presence in Kosovo  
Municipalities**

<b>Municipality</b>	<b>Kosovo Police Service (KPS)</b>	<b>UN Civil Police</b>	<b>Kosovo Protection Corps (KPC)</b>	<b>KFOR</b>
<i>Dečan/Dečani</i>	8 Kosovo Albanians	21 international	Kosovo Albanians	1350 Italian
<i>Ferizaj/Uroševac</i>	169 Kosovo Albanian	90 international	128 Kosovo Albanian, Askali	5600 USA/Greek
<i>Fushë Kosovë/Kosovo Polje</i>	12 Kosovo Albanians & Serbs	60 international		200 Norwegian
<i>Gjakovë/Gjakovica</i>	8 Kosovo Albanians	21 international	Kosovo Albanians	1350 Italians

<sup>520</sup> *Regulation on the Establishment of Kosovo Corps*, UNMIK/REG/1999/8, s.1.2, online: UN Homepage <http://www.un.org/peace/kosovo/pages/regulations/reg8.html> (date accessed: 30 June 2001).

<sup>521</sup> *Ibid.*, s.3.

<sup>522</sup> *Ibid.*

<sup>523</sup> *Ibid.*, s.1.



<i>Gjilan/Gnjilane</i>	167 Kosovo Serbs & Albanians	75 international	416 Kosovo Albanian	3500 USA
<i>Gllgovc/Glogov c</i>	54 Kosovo Albanians	31 international	112 Kosovo Albanian	40 Norwegian
<i>Istog/Istok</i>	60 Kosovo Albanians	35 International	52 Kosovo Alb.	600 Spanish
<i>Klinë/Klina</i>	9 Kosovo Albanian	12 international	52 Kosovo Albanian	300 Portuguese
<i>Kaçanik/Kaçanik</i>	52 Kosovo Albanian	34 international	47 Kosovo Albanian	200 international
<i>Leposavi /Leposa viq</i>	1 Kosovo Serb	17 international		740 Belgian
<i>Lipjan/Lipljan</i>	47 Kosovo Serbs(9) & Albanians (38)	45 international	183 Kosovo Albanian	830 Finnish/Canadi an
<i>Malishevë/Mališev o</i>	45 Kosovo Albanian	25 mixed	54 Kosovo Albanian	500 Russian
<i>Mitrovice/Mitrovic a</i>	121 Kosovo Albanian	164 international	Kosovo Albanian	2638
<i>Novobërdë/Novo Brdo</i>	1 Kosovo Serb	4 international		40 US
<i>Obiliq/Obiliq</i>	5 Kosovo Serbs, 5 Kosovo Albanians	40 international	52 Kosovo Albanian	Norwegian
<i>Pejë/Pejë</i>	255 Kosovar	66 international	574 Kosovo Albanian, Bosniac, Egyptian	5 500 international

<i>Podujevë/Podujevo</i>	83 Kosovo Albanian	45 international	120 Kosovo Albanian	600 UK
<i>Prishtinë/Priština</i>	578 Kosovo Albanian	661 international	800 mostly Kosovo Albanian	600 British
<i>Prizren/Prizren</i>	62 mixed	106 international	51 Kosovo Albanian	2 500 German/Turkish
<i>Rahovec/Orahovac</i>	2 Kosovo Albanian	42 international	52 Kosovo Albanian	German/Dutch
<i>Shtime/Štimlje</i>	26 Kosovo Albanian	6 international		134 Finnish
<i>Štrpce/Shtërpçë</i>	11 Kosovo Serbs	11 international		international
<i>Suharekë/Suva Reka</i>	90	59 international	200	450 Austrian
<i>Viti/Vitina</i>	2 Kosovo Albanian	25 international		USA
<i>Vushtrri/Vu• itrn</i>	137 Kosovo Albanian	37	170 Kosovo Albanian	800 French
<i>Zubin Potok/Zubin Potok</i>	3 Kosovo Serbs	46 international		Danish
<i>Zve• an/Zveçan</i>		13 international		250 Danish

Source: Municipality Profiles, online: OSCE Homepage

The authority over the organs providing order and security in the Province continues to be concentrated in the hands of the international presence: from the Table above we can see that each municipality has a heavy military presence (KFOR) and a considerable number of the UNMIK Police. The two Kosovar structures – the KPS and the KPC – are also placed under the authority of the international administration. Moreover, all the security duties are

entrusted primarily with the international contingent of the UNMIK Police or of the KFOR. The locally composed KPS and KPC are viewed only as assisting the international forces. The UNMIK seem to be reluctant to give more responsibilities to the local structures because of a fear that they will either fail to provide effective protection to the population or use their authority as a means of repression against minority members. In this respect, the security area differs from the judicial and representative branches of government, where the UNMIK initiated gradual transfer of responsibility to local organs.

## 2. Police powers

The KFOR and the UNMIK Police were entrusted with a wide range of complex security tasks. To achieve these objectives, the police and military in Kosovo are granted necessary coercive authority. Among their main powers are the authority to arrest and to detain and to exclude a person from a certain territory.

### a. Arrest and detention

Even after the two years of international presence in Kosovo, the KFOR remains active in exercising detentions and arrests. The KFOR broadly interprets its powers under paragraph 9(d) of SCR 1244.<sup>524</sup> In conversations with the representatives of the Amnesty International, the KFOR officials argued that they have authority to hold persons in detention indefinitely.<sup>525</sup> They also claimed power to continue detention notwithstanding court order to release a person.<sup>526</sup> The OSCE Legal Monitoring Section reported that the KFOR, in fact, often exercised those extraordinary powers. In many instances the KFOR continues to detain individuals subject to criminal investigation, notwithstanding court orders to release them.<sup>527</sup> For example, the suspects Shaban Beqiri and Xhemal Sejdiu were ordered to be released by a judge. However, they were held in detention by an order of the KFOR Commander.<sup>528</sup>

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<sup>524</sup> The paragraph reads that the international security presence is responsible, *inter alia*, for “ensuring public safety and order until the international civil presence can take responsibility for this task.”

<sup>525</sup> *Federal Republic of Yugoslavia (Kosovo)*, Amnesty International Report, March 2000, online: Amnesty International Homepage <http://www.web.amnesty.org/ai.nsf/index/EUR700132000> (date accessed: 28 April 2001).

<sup>526</sup> *Ibid.*

<sup>527</sup> *Criminal Justice System in Kosovo*, *supra* note 429.

<sup>528</sup> *Ibid.*

The instances of such detentions raise two concerns. The detention contrary to a court order for release is a violation of the prohibition on arbitrary detention. A person can be deprived of his liberty only on grounds and according to procedure established by law.<sup>529</sup> Although the KFOR was granted authority under SCR 1244 to provide security in the Province, it was not given power to violate human rights standards. When the KFOR continues to detain a person notwithstanding the court order to release, the KFOR not only violates the law, but also undermines the authority of the judiciary. Although the SRSB enjoys ample powers in the Province, he cannot exercise its authority over the military presence, KFOR, and consequently cannot control the action of the KFOR. The remedy against the KFOR actions, which contradict human rights standards would be to allow challenging their actions in Kosovo courts.<sup>530</sup>

The KFOR as a military force continues to utilize techniques more appropriate for cases of civil insurrection rather than for the exercise of policing. For example, in regard to the KFOR detection of 49 people in Mitrovica in February 2000, a representative from the UNMIK police told the Amnesty International that “[f]rom a military point of view there may have been a good reason to detain these persons, however, from a police point of view there was no probable cause.”<sup>531</sup> This means that the KFOR still heavily relies on rigid means of controlling public order, which may be considered excessive and disproportionate.

#### *b. Exclusion of a person*

Another recent development of the powers of the KFOR and the UNMIK Police is the authority to issue exclusion orders.<sup>532</sup> In the interests of security, the law enforcement authorities can issue an order requiring a person to leave or to stay away from a particular area if there are grounds to suspect that he has participated in preparation of acts that threaten

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<sup>529</sup> I.C.C.P.R., *supra* note 483.

<sup>530</sup> Currently, the KFOR personnel is immune any civil or criminal suit in the courts of Kosovo. See, *Regulation on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, UNMIK/REG/2000/057, online: UN Homepage < <http://www.un.org/peace/kosovo/pages/regulations/reg047.html> > (date accessed: 25 August 2001).

<sup>531</sup> *Federal Republic of Yugoslavia (Kosovo)*, Amnesty International, *supra* note 525.

<sup>532</sup> Authorized by *Regulation On the Exclusion of Persons for a Limited Duration to Secure Public Peace, Safety and Order*, UNMIK Regulation 2000/62, online: UN Homepage < <http://www.un.org/peace/kosovo/pages/regulations/reg062.html> > (date accessed: 17 July 2001).

peace within or outside the Province.<sup>533</sup> The exclusion is authorized for up to 30 days. A violation of an order is punished by 2 month of imprisonment.<sup>534</sup>

On the one hand, the Regulation constitutes an extension of the powers of the police and military. On the other, it introduces exclusion as a “softer” alternative to arrest or detention. Most importantly, the Regulation expressly provides for the right to challenge the lawfulness of an exclusion order before an international judge. A person to whom an exclusion order was issued can lodge a petition for a review. A petition is filed with the district court of a region from which a person was excluded.<sup>535</sup>

The petition is examined by an international judge. An international judge has to provide an opportunity of an adversarial debate between a person who is subject to the order or his representative and a prosecutor or representative of the authority that issued the order.<sup>536</sup> In deciding the issue, a judge has to consider three factors: whether there are grounds to suspect that a person was involved in the commission or preparation of acts that threaten peace within or outside the Province; the person’s link with the territory from which he is prohibited; and whether an order may subject him to persecution within the meaning of the 1951 Convention on the Status of Refugees.<sup>537</sup>

### **Interim conclusions**

The institution of the police is entrusted with an important task of providing law and order. The role of the police in a post-conflict society can be observed in at least two ways: 1) maintenance of law and order; 2) contribution to minority inclusiveness through both a multiethnic composition and the guarantee of equal treatment for everybody regardless of ethnic affiliation.

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<sup>533</sup> *Ibid.*, s.2.1.

<sup>534</sup> *Regulation On the Exclusion of Persons for a Limited Duration to Secure Public Peace, Safety and Order*, *supra* note 532.

<sup>535</sup> *Ibid.*, s. 3.1.

<sup>536</sup> This requirement strictly conforms with the requirements of *habeas corpus* proceedings set up by the case law of the European court of Human Rights: in *Toth v Austria* the European Court of Human Rights held that such hearings have to be adversarial and that authorities must ensure the detainee equality of arms.

<sup>537</sup> *On the Exclusion of Persons for a Limited Duration to Secure Public Peace, Safety and Order*, *supra* note 532, s.3.3

1) The way in which law and order are exercised will to a great extent define the stability in the country and influence both the confidence of the public in the quality of peace in the post-conflict zone and the commitment of the government to respect it.<sup>538</sup> In this respect, the powers of the KFOR and the UNMIK Police may be somewhat problematic. On the one hand, they may be recognized as necessary for providing law and order and are generally consistent with the tasks of peace-building. On the other, some powers, like the KFOR “holds,” may now seem excessive given the relative stabilization of the situation in the Province. Again, the peace-building concept does not provide any guideline in this respect. Thus, the only test of the consistency of the measures with the requirements of peace-building would be whether the measures advance the goals of the UNMIK.

Another question about the international policing of Kosovo is why the KFOR still continues its active role in law enforcement. In Chapter II I concluded that the KFOR played a role of “ground preparator” for the UNMIK. In my view, after two years of international presence, this task may be considered complete. Moreover, according to SCR 1244 the KFOR has already transferred the tasks of maintaining law and order to the UNMIK Police. The continuation of the active role of the KFOR seems to be inconsistent with the pattern prescribed in the UN documents on peace-building. The heavy KFOR presence in the Province raises some concerns about what might be the underpinning motives for the continuation of the KFOR deployment. Is it really necessary for the maintenance of stability in the Province or is it a way to maintain and strengthen the Western influence over Kosovo?

2) The composition of the police force and its ability to provide equal treatment to everybody regardless of his/her ethnic affiliation also contributes to minority inclusiveness. The analysis of the situation in Kosovo does not confirm that the police are able to sufficiently meet either of these two objectives. Even if the activities for the maintenance of law and order are to be considered sufficiently effective, they are carried out primarily by the international contingent. There is no basis for judging how effective the locally composed structures would be and how their multiethnic composition will help them to be fair and impartial.

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<sup>538</sup> Rama Mani, “Contextualizing Police Reform: Security, the Rule of Law and Post-Conflict Peacebuilding” in *Peacebuilding and Police Reform* at 10.

## **E. Conclusions to the Chapter**

The courts and the police are integral elements of the institutional structure for attainment of the rule of law. As parts of this structure and as elements of the broader system of government, the judiciary and the police must also be built with consideration for the principles of consociationalism. The contribution of the judiciary and the police to more inclusive government is of a different nature from the inclusiveness provided through representative organs. The legislative branch allows for the direct influence of minority representatives on the formation of the general legal framework for protection of minorities. In contrast, the courts and the police contribute to the inclusiveness in a more indirect way. They work at a community and individual level. The police and the courts are in a certain sense the agents of the representative branch, which put into life the directions of the legislature regarding minority policies.

In the process of adjudication a judge relies on his expertise as a professional and as an individual. The subjectivity of a judge should be controlled and limited by the principles of law, professional ethics and procedural rules. Several examples from court practice in Kosovo (see, e.g., the application of the KPC) show that the judiciary does not see itself controlled by legal or professional principles. Neither are there sufficient outside control mechanisms to preclude ethnic bias and other forms of unprofessional conduct. One of the remedies for fairer trials is a possibility to change a venue and/or require assignment of an international judge or prosecutor. This mechanism is good as a short-term measure. It allows for prevention or correction of injustice in an individual case. However, in the long run it does not help to make the judiciary more tolerant or professionally correct. This mechanism does not change the perception of a biased judge about defendants of other ethnicities. Thus, such a judge is likely to continue the exercise of partial adjudication in the future cases. One of the factors required to change perceptions and the inner characteristics of the judicial process is to have multi-ethnic courts, which will help to develop the interaction among perspectives of professionals with different ethnic and educational backgrounds. Currently, the Kosovo judiciary is not ethnically diverse. The most disturbing fact is that the highest courts, those which have the most active policy-making role, are purely Albanian. Taking into consideration the described instances of ethnic bias and subjectivity in adjudication, I am

inclined to think that the recommendations of such courts will also be targeted primarily for protection of the ethnic majority group.

Because the composition of the judiciary is important, a vital practical question is how diverse should the judiciary be to be considered multi-ethnic? I cannot advocate proportionality because a requirement of certain assigned quota may: first, lead to lower quality appointments – on account of the lack of sufficient numbers of a minority qualified as legal professionals, the requirement of proficiency may be compromised to satisfy numbers. Second, given the small population of some minorities and the absence of a protective mechanism like mutual veto for the legislature, proportional representation in the judiciary will provide no more than symbolic inclusiveness.<sup>539</sup> For the minority participation in the judiciary to be meaningful, there should be some protective mechanism similar to the mutual veto applied to the representative branch. Alternatively, the composition of the highest courts should be based on proportionate representation if possible and include more than a half of legal professionals from non-ethnic majority communities.

As can be seen, the implementation of consociationalism in the judiciary is significantly different and perhaps more complicated than in relation to the legislature. While the approach of the UNMIK to tailor the structure of the legislature was sufficiently creative, the development of a consociational judiciary needs further attention.

There is a concern that the failure of the judiciary and the police to provide inclusiveness and protection to the communities and individuals will intensify the dissatisfaction of minorities with their position in a society and lead to their more active struggle on the political arena and attempts to “revenge” ethnic majority members by discriminating against them in the area where they are in minority.

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<sup>539</sup> Devlin, MacKay & Kim, *supra* note 407 at 835.



## **Chapter V**

### **Making Ends Meet**

The discussion of the Kosovo reconstruction began with two implicit assumptions about the relevance of theoretical models and past experience to the resolution of contemporary conflicts. The first assumption is that each type of conflict has particular features and trends; the knowledge of these trends assists in developing a concept of “treatments” for conflict situations. Second, knowing the theoretically available treatments and the result of their application in the past we can predict the effect of similar measures in a current situation. This line of reasoning led to the idea of applying the peace-building and the consociational model in Kosovo and was the basis for the analysis of the institutional arrangements adopted there.

The principles for general peace-building are provided through the concept of peace-building developed in several UN documents. The peace-building concept is already serving a practical guideline for international activities. However, there are no specific recommendations for approaching reconstruction in an ethnically divided society. The guidelines for the new missions in divided societies are primarily derived from the expertise gained in past operations. In particular, the practice of some missions (e.g., in Bosnia) demonstrates that the international community includes ethnically sensitive mechanisms in the range of “treatments” for post-conflict societies. The consociational model that was used for the analysis in this thesis reflects many aspects of the mechanisms actually adopted in Kosovo and Bosnia. Thus, the chosen theoretical framework – combination of peace-building and consociationalism - largely follows the current practice of peace operations, but, at the same time, introduces a broader and more comprehensive vision of international activities.

The relationship between the peace-building and the consociational concepts is complex. The successful implementation of one concept is dependent on the implementation of the other. Peace-building in an ethnically divided society is not likely to provide long-term stability unless special attention is drawn to the meaningful participation of minorities in government. Consociationalism is not likely to be adopted by the local parties unless backed by the coercive power of an international administration. The two concepts promote and strengthen each other’s implementation, but, at the same time, they impose restrictions on

each other. For example, because consociationalism develops within the framework of peace-building, each activity intended to develop consociationalism has to comply not only with the principles of consociationalism, but also with the limits of peace-building. In turn, the political rationality of peace-building may sometimes require deviation from the requirements of consociationalism. For instance, the idea of consociationalism requires broader inclusion of all segments of the society in decision-making. However, the necessity to achieve conciliatory results quickly may motivate an international administration to negotiate only with the most influential local leaders. For example, the UNMIK negotiated the most important decisions with the IAC, which included only the Kosovar key leaders, rather than with the pluralistically composed KTC.

In certain respects, the relationship between peace-building and consociationalism is somewhat unequal. Peace-building is the principal activity. It defines the aims of the international reconstruction and serves as a general framework within which consociational democracy is developed. Consociational democracy is, basically, one of the means for the advancement of the goals of peace-building.

Peace-building is a hybrid of political and development activities.<sup>540</sup> The political aspect reveals itself at every stage and level of social reconstruction: in the motives and the ways of establishing an international administration, its interaction with the local parties and its operating through international organization. In Kosovo, for example, UNMIK's political activities took the form of negotiating political settlements among the warring parties, creating incentives for inter-ethnic dialogue between various ethnic segments of the Kosovo society, preparing a constitutional framework for the Province, etc.

At the initial stages of state reconstruction the peace-building concept and its first goal – transformation – dominate. For instance, in the first months of post-conflict rehabilitation in Kosovo all the power was concentrated in the UNMIK. The international administration was determined to use pressure and primarily rely on its own judgement about appropriate means (as opposed to consultation with the multiple local parties as required by consociational approach) in order to start the stabilization and transformation of a post-conflict society. With time, the second goal of peace-building – development and sustainability – acquires a status of priority and this is when consociationalism comes into

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<sup>540</sup> *Brahimi Report, supra* note 6, para. 4.

play. For example, in Kosovo consociationalism was applied in a limited way to the temporary UNMIK-created organs and in a more sophisticated and complete manner to self-government. For instance, if we admit the primary role of peace-building at the initial stages of state reconstruction, the leading role of the SRSG at the first stages of reconstruction can be viewed as acceptable.

Both consociationalism and peace-building seek to achieve stability and democracy in a post-conflict society. Consociationalism seeks stability through the development of inclusive government in which all segments of a society have an opportunity to participate in the formation of state policies. National political institutions are designed according to four principles - grand coalition, mutual veto, proportionality and segmental autonomy – which ensure minority participation in governing the society.

Peace-building addresses another level of political activism – interaction between an international administration and local *de jure* or *de facto* authorities. Peace-building includes the following elements: 1) partially based on host state's consent; 2) seeks transformation of a society and promotion of its sustainability; 3) requires close cooperation between peace-builders and local parties; 4) is comprehensive in nature; 5) includes institution-building as one of its major objectives; 6) closely connected with peacekeeping; and 7) permits participation of international organizations in peace-building by regional arrangements without restriction to Chapter VIII of the UN Charter. The first three requirements have a direct impact on the legitimacy of a peace-building mission. The last three primarily influence the effectiveness of a mission.

The implementation of the peace-building and the consociational concept means that institutional structures, the constitutional framework and the behaviour of political actors are shaped and exercised according to particular mandatory principles. At the same time, it is important that conceptual standards do not preclude the development of more efficient means for the treatment of a conflict situation. Certain deviations from theoretical standards that contribute to the positive effect of the reconstruction should be permitted. The threshold for permissible deviations from the standards of the peace-building and of the consociational concepts is different. Because peace-building is a general framework, within which other activities, including consociationalism, are developed, the compliance with its requirements should be stricter. For example, derogation from the first three requirements of peace-

building should not be permitted because it has serious impact on the long-term objectives of a concrete mission as well as on the future of peace-building in general. At the same time, an international mission should be given some discretion in deciding on the necessity of absolute or partial compliance with the rest of the requirements. In relation to these requirements the decision should be based on what combination of means will be the most efficient and, at the same time, the least questionable from the point of view of the peace-building concept.

At least two significant deviations from the requirements of the peace-building concept took place in Kosovo. The first is the leading role assumed by the Secretary-General in the interpretation of the UNMIK's mandate. His interpretation of Security Council Resolution 1244 served the basis for the UNMIK structure and mandate. Basically, the legitimacy of his interpretation has a direct impact on the legitimacy of the UNMIK. There is no explicit basis in the peace-building concept for the authority of the SRSG to interpret the competence of a mission beyond what is expressly provided in the resolution. Because of arguable legitimacy of the interpretation by the SRSG, another mechanism might be needed for the future peace-building missions.

The second instance represents a deviation from requirements that affect the efficacy of the mission rather than its legitimacy. It is the utilization of the KFOR instead of a peacekeeping mission as required by the peace-building concept. The utilization of a peacekeeping mission instead of the KFOR would not likely advance the goals of peace-building and, thus, the deployment of the KFOR seems to be a necessary and beneficial change to the UN scenario.

The peace-building concept is vague on many aspects of the international activities in administered territories. The ambiguity of the standards creates certain problems in determining which forms of international interference in internal decision-making are necessary and which are excessive. For example, the peace-building concept requires the international administration to cooperate with the local parties in the process of finding a solution for a reconstruction of the state and society. Cooperation does not always mean equality of parties in negotiation. The international administration has enough power and resources to push for certain solutions and the local actors often do not have a choice but to accept the proposed solutions. Pressure by the international administration may be a

necessary and acceptable tool to draw local parties to negotiation and to introduce the ethnically sensitive mechanisms. At the same time, an open-ended formulation of a peace-building concept gives room for certain usurpation of power by the international administration, even after the local self-government is put in operation. For example, the Kosovo Constitutional Framework gives the UNMIK wide supervisory powers over provincial and municipal self-government. These powers are dormant and can be exercised only for the purpose of providing full implementation of SC Resolution 1244 and ensuring sufficient protection of minority interests. Such a formulation, basically, imposes little restrictions on the powers of the SRSG because almost any step in self-government may be in one or another way interpreted as insufficient fulfillment of SC Resolution 1244 requirements. The only possible restriction against retaining too much power by an international administration are the goals of peace-building – transformation and sustainability. If the concentration of power within the international administration precludes the development of independent self-government, such power should be restricted. This seems to be the only available test to set up limits on the SRSG powers. However, such a test has several problems. The first is its rather general and imprecise character. A second problem is the issue into who makes a decision which instance of the exercise of the SRSG's power may be regarded as necessary and which one as excessive. Obviously, such decisions have to be made by a body or an official other than the SRSG; perhaps a UN commission or panel of international experts. The decisions that the SRSG activities impede the development of independent government can be made only if a clear pattern of excessive use of powers by the SRSG has been observed for a period of time.

In practice, it is always difficult to draw a line between the supervision that is necessary and that which is excessive. James Madison noted that “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>541</sup> Although this statement was made in a different context, it is particularly relevant for Kosovo. On the one hand, the “leash” for self-government must be not be too tight and short in order not to stifle its development and to allow it to exercise control over the

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<sup>541</sup> The Federalist No. 51 at 356 (James Madison) (Benjamin Fletcher Wright ed. 1974).

governed. On the other hand, while self-government is still not able to control itself effectively, certain international supervision is necessary.

Thus, it is possible to conclude that the observation of the requirements of the peace-building concept is essential not only for the legitimacy of a peace-building mission, but also for its generally more effective work. While derogation from certain peace-building characteristics can be acceptable and even beneficial, no exceptions to the first three principles should be allowed.

In contrast to some requirements of peace-building, the consociational techniques should be tailored creatively and with sensitive consideration given to local peculiarities. Because of heavy reliance on inclusiveness, quotas and proportions the original concept of consociationalism contains a number of contradictions and under certain circumstances may impede the development of one of the central features of democracy - competitiveness and opposition. Then, the advantage of consociationalism lies in elaborating a flexible solution, which reduces the adverse effects of consociational techniques. While the principles of grand coalition, mutual veto, proportionality and segmental autonomy should be the main guidelines for peace-builders, the institutional arrangement for their achievement must be tailored individually. In many respects the practice of the Kosovo mission represents an instance of individually tailored consociationalism.

Peace-building and consociationalism complement each other in the ways they approach democracy-building. Peace-building concentrates on the democracy-building at the level of the international administration and local leaders. Consociationalism works at the level of population. Even a successful political settlement between the segmental leaders will not guarantee long-term stability, unless the population is involved, understands and supports the changes.<sup>542</sup>

Generally, there are three levels of successful democratization. First is the very formation of institutional structures according to universally accepted (or deemed to be universally accepted) democratic principles. Another level involves an attempt to create

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<sup>542</sup> The involvement of the population in reconstruction and its acceptance of the solutions proposed by an international administration is one of the necessary features of peace-building. See, *Brahimi Report*, *supra* note 6.

social and intellectual conditions that can serve as an anchor for democracy.<sup>543</sup> The tie between these two levels is provided through democratic political culture.<sup>544</sup> Political culture allows a two-way connection between the institutional structures and “anchors” of democracy. It provides a possibility for democratically oriented personalities to make their way to the institutional structures and facilitates the contribution of the institutional structures to the formation of democratic personalities. Interestingly enough, neither the peace-building nor the consociational concept expressly discuss the issues of developing political culture consistent with the new democratic institutions.

Political culture affects the performance of democracy.<sup>545</sup> It defines what kind of leaders the population is likely to elect and what kind of tactics would have the most effect upon these elections - speculation over ethnic sentiment or elaboration of sound political programs. In turn, the functioning of the re-established self-government, judicial and police systems creates certain perceptions within ethnic communities and individuals about their place in the political system and in society as a whole. It shapes the orientation of groups and individuals towards political system and, thus, the political culture.<sup>546</sup> In my view, the orientation of the population towards political entities and towards its own participation in the political process can be developed, inter alia, through the consociational techniques because those techniques seek and provide inclusiveness. Meaningful inclusiveness creates a feeling among minority groups that they are not mere subjects of the majority governed political process, but that they can influence the formation of governmental policy. The belief that their participation matters may facilitate the more activist orientation of minorities towards the re-established political and governmental system. This, in turn, may help to resolve one of the difficulties faced by the UNMIK in the first years of the reconstruction – the reluctance of certain minorities to cooperate with the UNMIK and other segments of the society and boycott of democratic procedures, like elections.

Political culture, unlike institutional structures, takes much longer to develop. In my opinion, the institutional structures in a post-conflict society play the primary role in the

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<sup>543</sup> *Can Democracy Take Root in Post-Soviet Russia?* Harry Eckstein (ed.) (Lanham, Md. : Rowman & Littlefield, 1998) at 279.

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*, at 358

<sup>546</sup> Here, I understand political culture as defined by Almond and Verba. See, *supra* note 183.

formation of political culture. This is one of the reasons why special attention should be paid to the design of governmental structures and ways of their operation. Let us briefly sum up the arrangements in Kosovo.

Although the UN did not adopt any specific concept for the reconstruction of ethnically divided societies and Kosovo, in particular, we can find many consociational type arrangements implemented in the Province. The consociational principles of proportionality, mutual veto and grand coalition can be clearly traced in the organization of self-government and to lesser extent in the judiciary and the police. Generally, the elements of consociationalism were adopted extensively enough and in certain respects grew beyond the original consociational framework.

One has to recognize all the difficulties of establishing state institutions from scratch in a ruined post-conflict society. Nevertheless, there are several inconsistencies in the UNMIK approach to the utilization of ethnically sensitive mechanisms that could have been avoided.

First, the implementation of the consociational techniques differed, depending on the level of government: the provincial organs are operating on the basis of proportionality, mutual veto and grand coalition, while there is no mutual veto and less preconditions for grand coalition at the municipal level. This difference, on the one hand, may exemplify a lack of a balanced approach to institution-building. On the other hand, I also see it as an illustration of the dilemma between the necessity to address the ethnic factor and the danger of overemphasizing it. All organs and decision-making procedures cannot and should not be based on the consideration of the ethnic factor. Rather, it should be taken into account in the design of the central policy-making institutions and in relation to the most important questions of communal concern.

Second, in relation to some institutions consociationalism was used somewhat excessively, while in another insufficiently. For example, proportionate distribution of the committees' chairmanship in the Kosovo Assembly seems to be too inclusive of minorities and threatens to undermine the principle of meritocracy in the election process. Moreover, because chairmen are not likely to play particularly influential roles, proportionate distribution does not contribute much to the stronger position of communities in the Assembly. At the same time, the election of such an important official as the President of



Kosovo does not provide any mechanisms to increase the chances of him or her being a panethnic figure. This inconsistency may ultimately reduce the overall effect of consociationalism in Kosovo.

Third, while sufficient preconditions are created for the inclusiveness of the segments of society at the level of representative organs, little inclusiveness is provided through the judiciary and the police. For inclusiveness to be achieved, the consociational approach should be adopted in a coherent manner in relation to all branches of government. In particular, the multi-ethnic composition of the judiciary and the police essentially contributes to general inclusiveness of minorities. The representation of minorities in the courts and the police is a form of achieving "full membership in a larger society."<sup>547</sup>

The very idea of a multi-ethnic judiciary is not new, but finding an effective way to implement it is difficult. Even in stable democracies, serious questions arise about which criteria should be used for the selection of judges, and what level of inclusiveness is sufficient.<sup>548</sup> The current police and judicial structures in Kosovo cannot be regarded as contributing to minority inclusiveness either through their composition or through the way they exercise their functions. Thus, there is an apparent misbalance between the implementation of consociationalism in relation to different branches of government. The insufficient judicial and police protection may lead to a situation in which minorities shift the struggle for their rights from adjudication to personal resolution of matters through the use of force or other inappropriate techniques.

On the basis of the analysis of the Kosovo mission, several recommendations can be made in regard to the general UN policy in peace-building. First, the practice of Kosovo and Bosnia demonstrates a clear trend that ethnic factor is taken into consideration in design of the new democratic institutions. Nevertheless, there is no unifying approach to the issue what weight ethnicity should have in an institutional design of a state. For example, the Bosnian mission was criticized as overemphasizing ethnicity and, thus, deepening the gap between monoethnic communities.<sup>549</sup> Kosovo might be different in this respect. Although each post-

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<sup>547</sup> Devlin, MacKay & Kim, *supra* note 407 at 808.

<sup>548</sup> See, *ibid.*

<sup>549</sup> See, e.g., *Bosnia's November Elections: Dayton Stumbles*, ICG Report, 18 December 2000, online: ICG Homepage < <http://www.intl-crisis-group.org/projects/showreport.cfm?reportid=116> > (date accessed: 15 March 2001).

conflict situation is peculiar in its modalities, there should be a theoretical model that provides guidelines for consistent and integrated planning and assessment of international peace-building activities in divided societies. The UN should adopt a set of principles that will guide future international activities in the reconstruction of ethnically divided societies.

Second, a more clear determination of the limits of peace-building is necessary. In particular, it is important to decide whether the role of the Secretary-General in defining the structure and mandate of peace-building missions is an acceptable pattern for the future missions.

Third, because of the concerns that international administrations in post-conflict territories may preclude the development of independent self-government, some international body should be given power to monitor activities of international administrations and their officials. This body may also be instance to challenge the actions or decisions of international administrations by the local population. A possibility of such a challenge is important to promote the accountability of missions to the population, which they intend to assist. For example, currently the UNMIK and the KFOR enjoy immunity in Kosovo.<sup>550</sup>

It has been observed that the “successful democracy syndrome” requires, among other characteristics, that societies are generally not “plural.”<sup>551</sup> Hopefully, this observation is not true, but it once more demonstrates the controversy surrounding the very possibility of building a democracy in a divided society. The analysis of the institutional solutions adopted by the UNMIK suggests that the self-government arrangements have a good potential to be successful in providing certain level of minority inclusiveness. However, the success of promoting inclusiveness through the judiciary and the police is quite doubtful. At this point, there are enough reasons for both skepticism and optimism in regard to the UNMIK activities and there is no choice but to wait for the empirical evidence to confirm or dismiss these conclusions.

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<sup>550</sup> See, *Regulation on the Status, Immunities and Privileges of KFOR and UNMIK and Their Personnel in Kosovo*, *supra* note 530.

<sup>551</sup> Eckstein, *supra* note 543 at 367.

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## **Appendix 1**

### **Kosovo: Chronology of Events (1974-1999)**

<b>1974</b>	Kosovo obtains a status of an autonomous region within Serbia
<b>1975-81</b>	“Albanization” of political and social life in Kosovo, discrimination against province’s minorities, growing demands of Kosovo Albanians for the republican status of Kosovo
<b>1989</b>	
March	Kosovo autonomy is abolished
May	Milosevic becomes president of Serbia The LDK is formed
<b>1990</b>	The Assembly of the Socialist Republic of Serbia dissolves the Assembly of Kosovo. A secret referendum held in Kosovo, where the independence of Kosovo is established. Albania recognizes the self-declared republic.
<b>1991</b>	Election to the Kosovo “parallel” structures are held. Rugova is elected president of the Kosovo republic.
<b>1992</b>	The KLA is created.
<b>1994</b>	The KLA starts massive reprisals against the Serb police and security forces.
<b>1995</b>	The KLA intensifies its attacks on police stations, patrols and residences. The Serb police responds by series of raids in Drenica region, where houses are burnt and dozens of Albanians are murdered.

<b>1998</b>	<b>The ethnic tension grows.</b>
<b>March</b>	<b>The Security Council adopts Resolution 1160 where condemns the excessive use of force by the Serb police and imposes an arms embargo on the FRY.</b>
<b>September</b>	<b>The Security Council adopts Resolution 1199, which demands the cessation of hostilities in Kosovo and withdrawal of the Serb forces from the province; NATO prepares to military intervention.</b>
<b>October</b>	<b>Milosevic agrees to withdrawal of the FRY forces from Kosovo. The Security Council adopts Resolution 1203, which endorses the deployment of the OSCE Kosovo Verification Mission (KVM)</b>
<b>1999</b>	
<b>Feb. – March</b>	<b>Rambouillet talks (failed because of the Serb refusal to accept the agreement)</b>
<b>March 24</b>	<b>The 78-day NATO air strikes campaign starts.</b>
<b>June 3</b>	<b>The FRY accepts terms brought to Belgrade by EU envoy Ahtisaari and Russian envoy Chernomyrdin and demands the cessation of bombing.</b>
<b>June 9</b>	<b>The Military Technical Agreement is signed between the FRY and NATO</b>
<b>June 10</b>	<b>Solana calls a suspension of NATO air strikes. UN Security Council adopts resolution 1244 authorizing the deployment of the international security and civil presence in Kosovo.</b>
<b>June 12</b>	<b>The deployment of the international security presence - Kosovo Force (KFOR) – starts.</b>
<b>June 13</b>	<b>Special Representative <i>ad interim</i> Sergio Vieira de Mello arrives in Kosovo.</b>

- June 20**            **The withdrawal of the FRY forces from Kosovo is completed.**
- June 21**            **NATO and the Kosovo Liberation Army (KLA) officials sign a  
disarmament agreement**
- July 15**            **Special Representative for the UN Secretary-General, head of the  
UNMIK, Bernard Kouchner arrives in Kosovo**

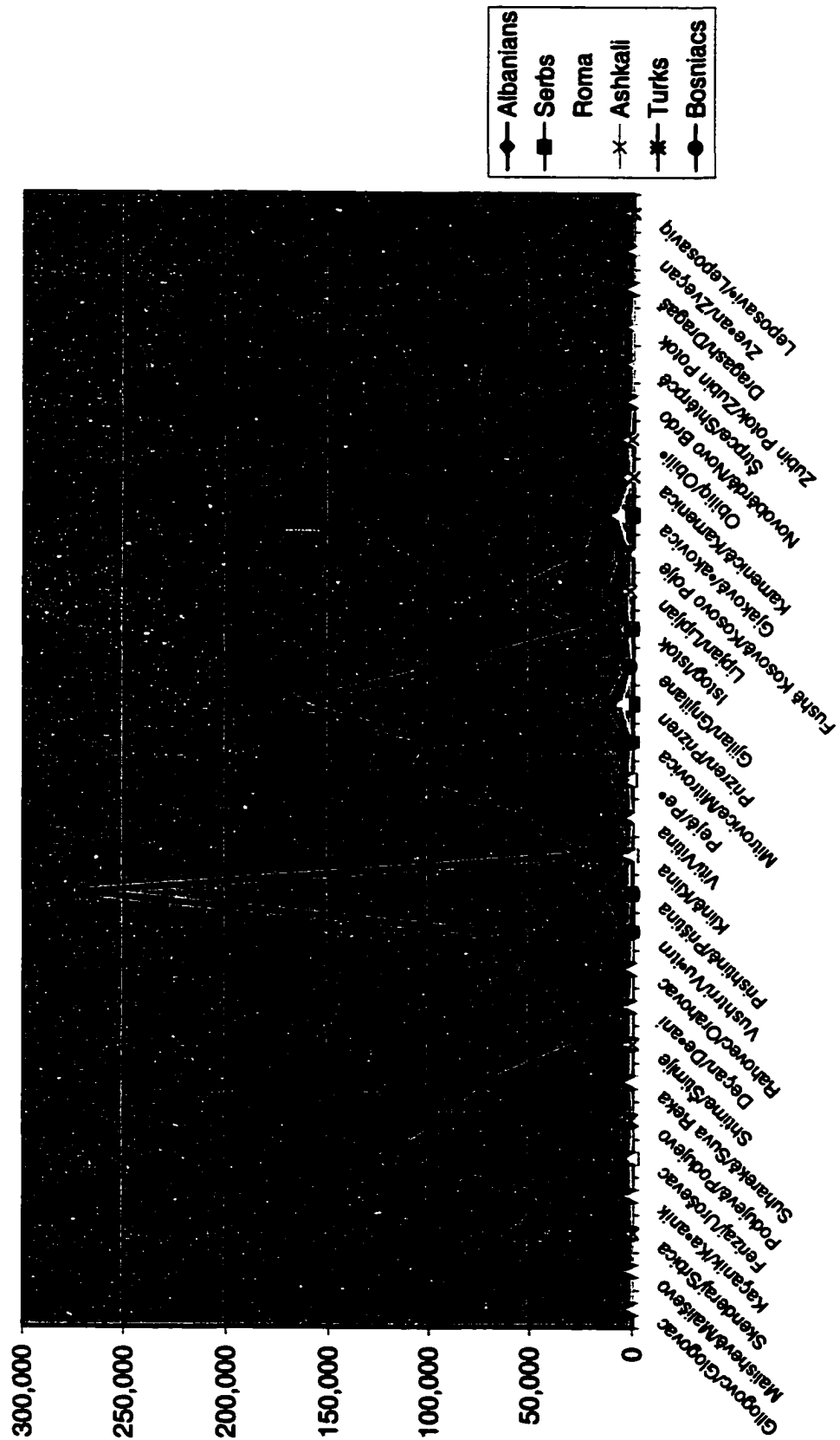
## Appendix 2 Kosovo Parties

N o.	Name	Acronym	Party Leader	Muni cipali ties Con te sted	Votes won, %	Seats
<b>Albanian Parties</b>						
1.	Democratic League of Kosovo	LDK	Ibrahim Rugova	29	58.0	504
2.	Democratic Party of Kosovo	PDK	Hashim Thaci	27	27.3	267
3.	Liberal Centre Party of Kosovo	PQLK	Naim Maloku	16	0.8	3
4.	Liberal Party of Kosova	PLK	Gjrgj Dedaj	19	0.6	2
5.	Social Democratic Party of Kosova	PSDK	Kaqusha Jashari	17	0.4	0
6.	Albanian Christian Democratic Party of Kosova	PSHDK	Mark Krasniqi	13	1.2	8
7.	Republican Party of Kosova	PRK	Feti Grapci	12	0.3	1
8.	Albanian National Democratic Party	PNDSh	Rexhep Abdullahu	9	0.3	1
9.	Social Democratic Union	USD	Luljeta Pula-Begiri	7	0.1	0
10.	Albanian national Democratic Movement	LNDSH	KajtaZ Fazlia	4	0.1	0
11.	Party of Democratic Action of Kosova	SDA	Numan Balic	5	0.5	4
12.	Green Party of Kosova	PGJK	Daut Maloku	6	0.2	0
13.	Albanian Republican Party	PRSH	Skender Hoti	3	0.1	0
14.	Liberal Democratic Party of Kosova	PLDK	Agim Gjakova	2	0.1	0
<b>Montenegrin Parties</b>						
15.	Ashkali Albanian Democratic Party of Kosova	PDASHK	Sabit Rrahmani	7	0.2	1
17.	National Democratic Front of Kosova	PBKD	Durmish Rizvanolli	4	0.1	0

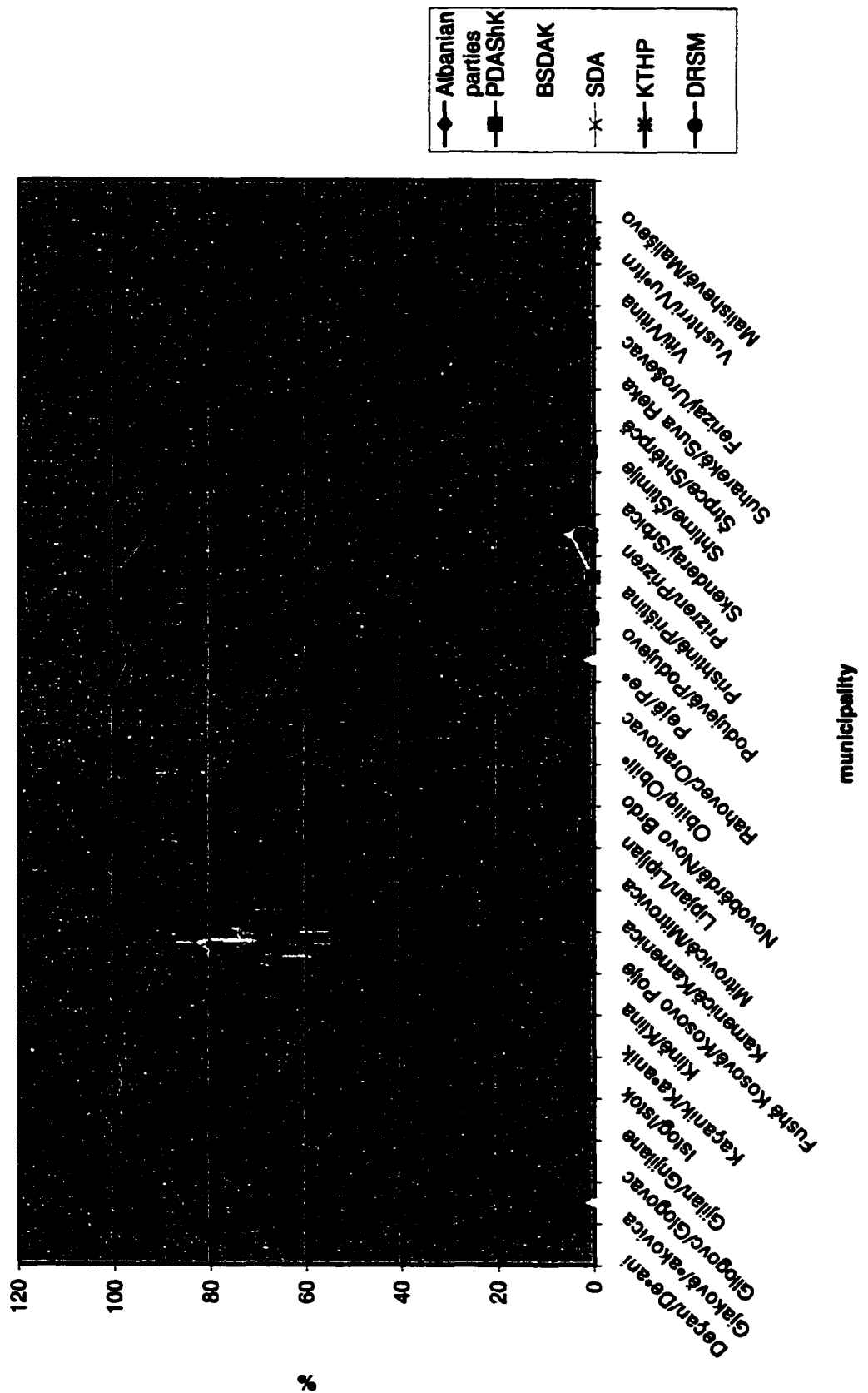


16	Bosniacs Party of Democratic Action of Kosova	BSDAK	Hilmo Kandic	5	0.6	2
	Turkish People's Party of Kosova	KTHP	Sezair Saipi	4	0.1	0
	Democratic Reform Party of Muslims	DRSM	Dezair Murati	1	0.3	1
	Alliance for the Future of Kosova	AAK	Ramush Haradinaj	29	7.7	71
	Coalition for Independence	KP	Rexhep Qosja	18	0.4	0
	Mitrovica Turk Community	MITT	Ergin Koroglu			
	Citizens' Initiative of Gora	GIG	`Ibisi Rustem	1	0.3	3
	Citizens' Initiative the Independents of Mitrovica	IQPM	Qemajl Sokoli			

### Appendix 3. Population Distribution



**Appendix 4. Votes by Ethnic Criterion**



# Appendix 5– Progress Report on the Formation of Municipal Assemblies

February 2001

Updated 2

Municipality	Elected Party Representatives – K/Albanian	Elec. Party Rep. – Minorities	Appointed MA Members Sworn in	President	Deputy-President
Deçan/Deçani	19 LDK; 10 AAK; 2 PDK		N/A	LDK; Mehmet Bojcaj	AAK; Nazmi Selmonaj
Dragash/Drage	10 LDK; 6 PDK	3 GIG; 2 SDA	N/A	LDK; Halim Shemshadini	LDK; Aslan Zejnullahu
Ferizaj/Uroševac	29 LDK; 11 PDK; 1 AAK		1 Ashkali (PDASHK); Pending: 1 Rom/Ashkali	LDK; Adem Salihaj	LDK; Faik Grainca
Fushë Kosovë/Kosovo Polje	13 LDK; 4 PDK; 3 AAK	1 PDASHK;	Pending: 4 KS; 1 Ashkali?	LDK; Skender Zogaj	LDK; Sabit Hykolli
Gjakovë/Gjakovica	26 LDK; 7 AAK; 4 PShDK; 3 PDK; 1 PLK		2 Egyptians	LDK; Aqif Shahu	LDK; Haxhi Kambeari
Gjilan/Gjilane	27 LDK; 11 PDK; 2 AAK; 1 PQLK		1 Turk (TDP); 1 Rom; Pending: 6 KS	LDK; Lutfi Haziri	LDK; Xhemal Hyseni
Glogovë/Glogovac	27 PDK; 4 LDK		N/A	PDK; Izet Ibrahim	PDK; Xheladin Gashi
Koplik/Koplik	22 LDK; 5 PDK; 3 AAK	1 SDA	1 Egyptian; 1 Bosniac (SDA?); Pending: 1 KS	LDK; Fadil Ferati	LDK; Ferat Hajzeraj
Kaplan/Kaplan	16 PDK; 12 LDK; 2 AAK; 1 PRK		N/A	PDK; Tahir Oka	PDK; Gjabir Zharku
Kamenica/Kamenica	19 LDK; 9 PDK; 3 AAK		1 Rom; Pending: 11 KS	LDK; Shaip Surdull	LDK; Nexhat Rexha
Klinë/Klina	17 LDK; 10 PDK; 2 AAK; 2 PShDK		1 Rom; Pending: 1 KS	LDK; Ismet Raci	LDK; Prenk Gjetoj
Leposavi/Leposavi			14 KS; 1 Bosniac (JUL); Pending: 2 KA	Nezad Radosavljevic	Dragisa Krstovic
Lipjan/Lipjan	16 LDK; 13 PDK; 2 AAK		1 Ashkali (PDASHK); 1 Rom; 1 Croat; Pending: 5KS	LDK; Basri Demiri	LDK; Mevlide Shamolli
Mallëkavë/Mallëkovo	16 LDK; 13 PDK; 1 AAK; 1 indep.		N/A	LDK; Jakup Kastrati	LDK; Mrs. Remzije Thaqi
Mitrovicë/Mitrovica	29 LDK; 11 PDK; 1 AAK		1 Bosniac; Pending: 11 KS	LDK; Faruk Spahiu	LDK; Mustaj Pilana
Novobërdë/Novo Brdo	9 PDK; 7 LDK; 1 AAK		1 Rom; Pending: 12 KS (6 sworn in?)	PDK; Emin Gerbeshi	PDK Gafur Mustafa
Obiliq/Obiliq	12 LDK; 5 PDK; 4 AAK		1 Ashkali (PDASHK); Pending: 5 KS, 1 Rom/Ashkali	LDK; Rexhap Kelani	LDK; Hajriz Bekteshi
Pajë/Pajë	28 LDK; 8 AAK; 4 PDK	1 SDA	1 Rom; 1 Egyptian; 1 KS/SPS; 1 Bosniac? Pending: 1 KS/SNC	LDK; Ali Lajqi	LDK; Smajl Shala
Podujevë/Podujevo	28 LDK; 10 PDK; 3 AAK		1 Ashkali	LDK; Agim Velu	LDK; Agim Kika
Pristinë/Pristina	36 LDK; 11 PDK; 4 AAK		1 Ashkali (PDASHK); 1 Bosniac (BSDAK)?; Pending: 5 KS, 1 Turk; 1 Rom	LDK; Selih Gashi	LDK; Nebih Zariqi
Prizren	24 LDK; 10 PDK; 2 AAK; 1 PShDK; 1 PNDSh	2 BSDAK; 1 DRSM	1 Turk (TDP); 1 Rom; 1 Bosniac (indep.); Pending: 1 Turk (KTHP)	LDK; Eqrem Kryeziu	LDK; Mrs. Semahate Mashkulli
Rahovec/Rahovac	20 LDK; 6 PDK; 5 AAK		1 KS; 1 Rom; (1 additional appointed KS has declined)	LDK; Esat Haxhijsa	LDK; Nahid Elshani

Shkime/Shkime	11 PDK; 9 LDK; 1 AAK	1 Ashkali (PDASHK)	PDK; Fehmi Mujota	LDK; Ahmeti Ahmed
Skenderi/Srbica	27 PDK; 4 LDK	Pending: 2 KS	PDK; Ramadan Gashi	PDK; Ahmed Latif
Sipos/Sipos	9 PDK; 8 LDK	Pending: 17 KS		PDK; Bahri Hyseini
Suharek/Suva Reka	30 LDK; 7 PDK; 2 AAK; 2 PQLK	N/A	LDK; Uke Bytyqi	LDK; Vitor Markaj
Vina/Vin	19 LDK; 8 PDK; 2 AAK; 1 PShDK; 1 PLK	2 KS; Pending: 2 KS	LDK; Samet Dalipi	PDK; Nexhmedin Arifi
Vushtri/Vushtri	20 LDK; 9 PDK; 2 AAK	Pending: 3 KS	LDK; Halzer Kraeniqi	LDK; Ibush Januzi
Zubin Potok		15 KS; 2 KA	Slavica Ristic (elected, not appointed by UNMIK)	KS (elected, not appointed by UNMIK)
Zvečan/Zvečan		12 Serbs (+ 3 accepted but not yet sworn in); (2 appointed KA withdrew before taking the oath)		

*This is an unofficial working document – for internal OSCE use only – comprising information from OMIK Democratisation Officers in FOs and RCs, the HQ DD Advisor on Minorities as well as from the Municipal Helpdesk (TTF).  
Stig.Kjeldsen@omik.org (Democratisation Department).*

*Please send any corrections or amendments to*

# Appendix 6 – Progress Report on the Formation of Municipal Structures

Updated 20 March 2001

Municipality	President of MIA	Policy and Finance Committee / Member affiliation	Communities Committee / Member affiliation	Mediation Committee / Member affiliation	Community Office	Chief Exec. Off.	Board of Directors / Director affiliation
Dečan/Dečani	LDK	4 LDK; 2 AAK; 1 PDK	√	√		LDK aff.	4 LDK; 2 AAK; 1 PDK; 1 indep.
Dragash/Dragaš	LDK	3 LDK; 2 PDK; 1 GIG; 1 SDA	1 SDA (chair); 1 GIG; 1 LDK	2 PDK (chair); 1 GIG; 1 SDA; 1 LDK; 1 Gorani (indep.)		LDK	5 LDK; 1 GIG; 1 SDA; 1 indep. (KA?); 2 (affiliation?)
Ferizaj/Uroševac	LDK	7 LDK; 3 PDK; 1 AAK	1 LDK; 1 PDK; 3 Vacant seats	5 LDK; 2 PDK	√	LDK	8 LDK; 1 PShDK
Fushë Kosovë/ Kosovo	LDK	4 LDK; 1 PDK; 1 AAK; Vacant seat: 1 Appointed	√	√		√	
Polje							
Gjakovë/akovic a	LDK	6 LDK; 2 AAK; 1 PShDK; 1 PDK; 1 PLK	1 Rom; 1 Egyptian; 1 Bosniac; 1 LDK; 1 PShDK	4 LDK; 1 AAK; 1 PShDK; 1 Egyptian		LDK	7 LDK; 2 PShDK; 1 AAK
Gjilan/Gnjilane	LDK	6 LDK; 3 PDK; 1 AAK/POLK	2 LDK; 1 PDK; 3 Vacant seat	2 LDK; 1 PDK; 1 (to be checked) Vacant seat	√	LDK	6 LDK; 1 AAK; 1 PShDK; 1 indep.; Vacant seat: 1 KS
Glogovac/Glogov ac	PDK	5 PDK; 1 LDK		2 PDK; 1 LDK		PDK	10 Directors
Istog/Istok	LDK	5 LDK; 1 PDK; 1 AAK	2 LDK; 2 Bosniac; 1 AAK; 1 Egyptian; 1 KS	2 LDK; 2 Bosniac; 1 PDK; 1 Egyptian		LDK aff.	7 LDK; 1 AAK
Kaçanik/Kaçanik	PDK	√		3 PDK; 2 LDK; 1 PRK; 1 AAK/AQK		PDK	6 Directors; Pending: 3
Kamenica/Kame nica	LDK	5 LDK; 1 AAK; 1 PDK; 1 Rom. Vacant seat: 1 KS	2 LDK; 1 PDK; 1 Rom. Vacant seat: 3 KS	2 LDK; 1 PDK; 1 Rom. Vacant seats: 2 KS	√	LDK	5 LDK; 1 PDK; 1 KS (Macedonian); 1 re-advertised (KS reserved)
Klina/Klina	LDK	2 LDK; 2 PDK; 1 AAK; 1 PShDK	1 Ashkali; 1 Rom; 1 LDK	2 Roma; 2 LDK		LDK	4 LDK; 4 PDK
Leposaviq /Lepos aviq	√	√	√ (KA vacant)	√ (KA vacant)			√
Lipjan/Lipljan	LDK	√		4 LDK; 3 PDK; 3 community representatives			
Malishevë/Mališe vo	LDK	5 LDK; 3 PDK; 1 AAK					
Mitrovica/Mitrovic a	LDK	7 LDK; 3 PDK; 1 AAK			√		
Novobërdë/ Novo Brdo	PDK	2 PDK; 1 AAK; 1 KS; 1 Vacant (for LDK)	1 PDK; 1 LDK; 1 AAK; 1 Rom; 1 KS	2 LDK; 2 PDK; 1 KS	√	PDK	3 K/Serbs; 2 LDK; 2 PDK

Obiliq/Obiliq-Pejë/Pe	LDK LDK	√ 7 LDK; 2 AAK; 1 PDK; 1 SDA	√	√	LDK LDK aff.	5 Directors; 1 re-advertised
Podujevë/Podujevo	LDK	7 LDK; 3 PDK; 1 AAK		3 LDK; 2 PDK; 1 AAK; 1 Ashkali	LDK	6 LDK + 2 LDK aff.; 1 PSHDK; 1 indep.
Prishtinë/Priština	LDK	5 LDK; 2 PDK; 1 AAK; 1 Bosniac	1 Bosniac; 1 Ashkali; 1 Turk; 1 LDK; 1 PDK; vacant: KS	2 LDK; 1 AAK; 1 Ashkali; 1 Bosniac; 1 Turk; vacant: KS	LDK aff.	10 Directors
Prizren	LDK	6 LDK; 2 PDK; 1 PSHDK; 1 BSDAK; 1 AAK	1 DRSM (chair); 1 BSDAK; 2 LDK; 2 PDK; Pending; 2 Turk; 1 Bosniac; 1 Rom	3 LDK (chair); 1 PDK; 1 AAK; 1 indep. Bosniac; 1 TDB (Turk)	LDK	3 LDK + 6 LDK support; 2 PDK; 1 PSHDK; 2 indep.
Rahovec/Orahovac	LDK	4 LDK; 2 PDK; 1 AAK	2 KS; 1 Rom; Pend?: 2 LDK; 1 PDK; 1 AAK; vacant: 2 KS	Pending: 2 LDK; 1 PDK; 1 AAK; 4 community representatives	√ LDK aff.	8 LDK + LDK aff.; 1 PSDK; 1 unknown affiliation
Shtime/Štimlje	PDK	4 PDK; 2 LDK; 1 AAK	1 Ashkali (Chair); 1 LDK; 1 PDK; 1 KS; 1 Rom	1 LDK (Chair); 1 PDK; 2 community repre. (1 PDASHK)	PDK	√ (recruited last Spring)
Skenderaj/Srbica	PDK	10 PDK; 1 LDK			PDK	
Štrpce/Shtërpçë		3+2 temporary KA; Vacant: 5 KS				
Suharekë/Suva Reka	LDK	7 LDK; 1 PDK; 1 AAK	1 Roman-Catholic; 1 Rom; 1 PDK; 1 LDK; 1 unknown	1 PDK (Chair); 2 LDK; 1 KS; 1 PSHDK / Roman-Catholic	LDK	7 LDK + 2 LDK aff.; 2 indep.; 1 AAK aff.
Vitina/Vitli	LDK	6 LDK; 4 PDK; 1 AAK; 1 PSHDK			√ LDK	(2 KS reserved)
Vushtrri/Vuštër	LDK	5 LDK; 2 PDK	Yes	Yes	LDK	2 LDK aff.; 1 PDK; 3 indep.
Zubin Potok	√	√ Vacant seat: 1 KA	√ Vacant seat: 1 KA	√ Vacant seat: 1 KA	√	√
Zvečan/Zvečan	√	√	√	√		

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